IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-284

MARVIN LICHTIG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR

WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAW OFFICES OF RICHARD A. DeSANTIS
RICHARD A. DeSANTIS

Attorneys for Petitioner
MARVIN A. LICHTIG

1901 Avenue of the Stars
Suite 700
Los Angeles, California 90067

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases

Statutes, Rules and Regulations

Articles and Other Secondary Sources

INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. _____

MARVIN LICHTIG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR

WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner Marvin A. Lichtig respectfully prays that a Writ of Certiorari issue to review the decision by the United States Court of Appeal for the Ninth Circuit affirming his conviction under the following securities statutes: 15 U.S.C. §§77f, 77q(a), 77x, 78ff, 78 l, and 78n.

CITATIONS TO OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix "A". To date, the Opinion is not reported in West's Federal Reporter, Second, although it is expected that it will soon be reported therein.

JURISDICTION

The Opinion in the Court of Appeals was filed on May 15, 1978. A Petition for Rehearing was filed by Petitioner Lichtig on May 30, 1978, which was denied by Order filed on July 21, 1978 (attached hereto as Appendix "B").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

A. Whether the Supreme Court should overrule or modify the Allen instruction (Allen v. United States, 164 U.S. 492 (1896)) given to the deadlocked jury below. Because the Supreme Court has not ruled on the Allen instruction in the past 82 years, considerable confusion has resulted among the various Courts of Appeal; thereby prompting calls by judges, lawyers, and legal scholars for this Court to consider this specific question.

B. In light of Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) what is the source and nature of the duty imposed by federal criminal statutes upon auditing accountants? Specifically,

> (1) Does the legislative history behind the federal securities statute allow for the criminal conviction of an accountant not for actual knowledge of a fraud, but for "recklessness" in the performance of his audit?

(2) Does Ernst & Ernst v. Hochfelder knock out the legal underpinnings of the "recklessness" jury instruction used in the Court below and in United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), cert. denied 425 U.S. 394 (1976)?

(3) If an auditing accountant can still be convicted for "recklessness", is his criminal recklessness determined by reference to the generally accepted accounting practices within his profession ("GAAP"), or do the federal statutes themselves impose a separate criminal standard independent from GAAP?

(4) If criminal liability for "recklessness" under the securities statutes is determined by GAAP, is it GAAP operative at the time of trial or at the time of the purported crime?

C. Whether a trial court should make a determination of an accountant's criminal guilt under the federal securities statutes for failure to make a more complete audit assertedly required by general accepted auditing standards, when that trial court determination is made

(1) without receiving into evidence any expert testimony as to the generally accepted auditing standards operative at the time of the alleged crime; and
(2) without receiving into evidence over one half of the accused accountant's work papers.

STATEMENT OF THE CASE

The federal Indictment below stemmed from the financial collapse of the Equity Funding Corporation of America in 1973, and essentially alleged a criminal conspiracy to violate various provisions of the 1933 and 1934 Federal Securities Acts (15 U.S.C. §§77q and 78, among others), as well as various allegations describing offenses thereunder. The substantive allegations related to EFCA's financial statements for the years 1964-1972 and alleged that Petitioner Lichtig willfully and knowingly defrauded the investing public by making misleading statements of material facts, or omitting to state material facts which were necessary in order to make the statements not misleading under the circumstances.

In the early 1960's, EFCA sought to establish itself as a highly glamorous purveyor of a novel and innovative investment package involving mutual funds and life insurance. No accounting firms had previously audited an investment organization of this type, and there existed no specific, contemporary auditing standards which had been applied to a company of this nature.

EFCA grew rapidly throughout the mid-1960's and presented to the investing public an amazing rate of financial growth. Beginning in 1968, however, EFCA's management experienced certain problems with regard to the accuracy or adequacy of the internal bookkeeping procedures in relation to the company's true financial status, and in order to maintain the extraordinary growth rate which the investing community fully expected in the 1968 financial statements, EFCA's management engaged in a plan to purposely: (1) deceive and mislead the investing public by creating fictitious income and other journal entries which showed an unrealistic financial status; and, accordingly,

(2) deceive and mislead any independant auditor.

The trial below established to a certainty that EFCA's management relied heavily on an elaborate facade to deceive outside auditors in order to purposely prevent such auditors from discovering the fraud. In fact, quite a number of instances of management deception involved a deliberate failure to even record certain liabilities---a practice which is notoriously difficult (if not impossible) to detect.

During the audit for year-end 1968, Petitioner Lichtig was a junior partner in the accounting firm of Wolfson, Weiner, Ratoff & Lapin, the firm which audited EFCA. Lichtig, although charged with intentional fraud, was apparently convicted of "recklessly" (per the court's instructions to the jury as described at p. 12 , infra) failing to discover or disclose the management's internal bookkeeping fraud, even though the trial below clearly established not only that EFCA's management purposely deceived Lichtig and other independant auditors, but also that no one ever told Lichtig about the fictitious journal entries and other bogus bookkeeping procedures.

Lichtig was also charged with other related offenses allegedly committed after he became a strictly administrative officer of EFCA in May, 1969. The acts committed as an administrative officer were purportedly indictable by reason of Lichtig's "knowledge" he allegedly obtained while an independant auditor of EFCA in prior years.

Trial began on January 7, 1975 and the jury began its deliberation on May 8, 1975. After four and one half days of deliberation, the jury foreman sent a note to the trial judge indicating an impasse in deliberations and stating that the jury stood 11 to 1. The

Court then gave the Allen instruction (described in detail at p. 8-9 , infra) and the jury resumed its deliberation on May 19, 1975. On the afternoon of May 20, 1975, the jury returned a verdict of guilty.

UNDER THE STANDARDS SET FORTH IN RULE 19 OF THE SUPREME COURT RULES, A WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE

The Opinion below is in conflict with other Court of Appeals decisions concerning the Allen instruction. The Third and Tenth Circuits have indicated that they will no longer use it at all, and other Courts have allowed conflicting and confusing modifications under certain circumstances. The absence of uniform standards among the circuits and the resulting ambiguities have prompted calls by judges[1/] and legal scholars[2/] for this Court to break its 82 years silence on the Allen instruction and to clarify the situation. Petitioner submits that such clarification should be a Court ruling that the Allen instruction is per se a coercive instruction designed to blast a minority of the jury into

---

1/ Judge Wright noted in United States v. Seawell, 550 F.2d 1159, 1167 (9th Cir. 1977) that "in view of the split among the circuit courts [concerning the Allen instruction], a decision by the Supreme Court would be appropriate."

2/ Note, 22 LOYOLA L.REV. 667, 675 (1976). See also law review articles cited at page 11 , infra.

conformance with the majority at the sacrifice of the defendant's right to an uncoerced jury, even if that jury is a hung jury.

This Petition also raises a fundamental federal securities law question not settled by this Court. Although this Court in Ernst & Ernst v. Hochfelder, supra, has found that the legislative history behind the securities statutes will not support recent judcially created civil liability for negligence in past years, this Court has yet to respond to the more serious question of whether the legislative history supports criminal conviction for "recklessness". The federal prosecutors and the Securities and Exchange Commission have convinced the Court below that cases decided before Ernst & Ernst v. Hochfelder, such as United States v. Simon, 425 F.2d 796 (2d Cir. 1969); and United States v. Natelli, 527 F.2d 311 (2d Cir.1975); cert. denied 425 U.S. 934 (1976) allow an accountant to be criminally convicted for "recklessness" in performing his audit. However, no court has construed Simon and Natelli in light of the legislative history analysis contained in Ernst & Ernst v. Hochfelder. Petitioner Lichtig asks this Court to do so.[3/]

Although this Court stated in footnote 12 of Ernst & Ernst v. Hochfelder, that it was leaving open "the question of whether, in some circumstances reckless behavior is sufficient for civil liability. . .", this question should not be left open in the more serious case of criminal liability, where the standards of scienter are to be more strictly and carefully enforced and where due process rights arise.

[3/] The Court below did not even mention Ernst & Ernst v. Hochfelder in its opinion.

Another important question is raised by the fact that Lichtig was convicted of rendering an inadequate audit, despite the fact that

(1) the government's own witnesses testified that over one half of the accountants' work papers were not admitted into evidence, and

(2) the government failed to present any evidence as to GAAP operative at the time Lichtig rendered his audit (1968-1969).

The Court of Appeals should not have sanctioned a conviction based upon such a departure from the accepted and usual evidentiary method for establishing the commission of a securities crime.

ARGUMENT

I

THE ALLEN INSTRUCTION GIVEN BELOW RESULTED IN A VIOLATION OF PETITIONER LICHTIG'S CONSTITUTIONAL RIGHT TO A JURY DELIBERATION UNCOERCED BY THE JUDGE, EVEN IF THAT DELIBERATION NEVER REACHES AN UNANIMOUS VERDICT.

After being informed that after four and one half days of deliberation the jury was deadlocked 11 to 1 and could not reach an unanimous verdict, the Court delivered the following instruction as allowed in Allen v. United States, 164 U.S. 492 (1896).

> "This is an important case. The trial has been expensive in time and money to both the defense and the prosecution. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, must be disposed of some time . . . . "They are matters which along with others and perhaps more obvious ones

remind us how desirable it is that you unanimously agree on a verdict. . ." (emphasis added).

After one day of deliberation, the jury foreman informed the court that a verdict could be expected within "a reasonable time." The jury returned a verdict of guilty the next day.

The precise language of the Allen instruction given to the jury below was found in United States v. Harris, 391 F.2d 348 (6th Cir. 1968) to be unduly coercive upon the jurors and to constitute a violation of the defendant's constitutional rights. The Harris Court specifically agreed that a statement by the Judge that a lawsuit must be decided at sometime

> "is an unauthorized version of the Allen charge and is calculated to have a coercive effect on the jury. . . . [T]he statement is not completely accurate. The possibility of this agreement by the jury is part of the jury system. . . . [T]he possibility of . . . lack of the unanimous verdict is a protection conferred upon a defendant in a criminal case by the Constitution. For a Judge to tell a jury that a case must be decided is, therefore, not only coercive in nature, but misleading in fact. It precludes the right of a defendant to rely on the possibility of disagreement by the jury." 391 F.2d at 355.

Courts of Appeal have stricken down several Allen instructions for similar reasons. See e.g. United States v. Anguilo, 485 F.2d 37 (1st Cir. 1973); United States v. Burley, 460 F.2d 998, 999 (3rd Cir. 1972); United States v. Thomas, 449 F.2d 1177, 1182-1183 (D.C.Cir. 1971);

United States v. Fioravanti, 412 F.2d 407, 416 (3rd Cir. 1969) cert. denied, 396 U.S. 837 (1969); Williams v. United States, 338 F.2d 530, 533 (D.C.Cir. 1964); Green v. United States, 309 F.2d 852, 856 (6th Cir. 1962).

This Court, while never expressly reputiating Allen v. United States since its decision in 1896, did in Jenkens v. United States, 380 U.S. 445, 446 (1965) reverse the conviction obtained after the trial court instructed the jury that it had to reach a decision. This Court expressly held that ". . .the Judge's statement had the coercive effect attributed to it."

Furthermore, the Courts of Appeal have held that when the trial judge knows that the jury is split 11 to 1, and the jury knows that the trial judge knows, the Allen instruction clearly coercive and prejudicial to the defendant's constitutional right to rely on the possibility of a hung jury. See e.g. United States v. See, 505 F.2d 845 (9th Cir. 1974); cert. denied, 420 U.S. 992 (1975); Jones v. Norvell, 472 F.2d 1185 (6th Cir. 1973), cert. denied 411 U.S. 986 (1973); United States v. Burley, supra, and United States v. Rogers, 289 F.2d 433, 435 (4th Cir. 1961).

Finally, even the Court below has expressly noted that the Allen instruction has "an inherently coercive effect", United States v. Seawell, 550 F.2d 1159, 1162 (9th Cir. 1977) and has on several occasions disapproved of its use. See e.g. United States v. See, supra, 505 F.2d at 851; United States v. Contreras, 463 F.2d 773 (9th Cir. 1972) ("We have a profound feeling that it [the Allen charge] was coercive upon the jury.") 463 F.2d at 774); Sullivan v. United States, 414 F.2d 714, 716 (9th Cir. 1969) (we "doubt that it is really any longer adviseable to give the Allen instruction at all. . .") and Tolan v. United States, 370 F.2d 799 (9th Cir. 1967), cert. denied 387 U.S. 392 (1967).

cert. denied, 387 U.S. 392 (1967).

Several law review articles have criticized the coercive effect of the Allen instruction, noted the confusion among the circuits, and have pointed the way to the solution: this Court should break its 82 year silence on Allen v. United States. See e.g. 22 LOYOLA L.REV. 667 (1976); Note, The Allen Charge: Recurring Problems and Recent Developments, 47 N.Y.U.L. REV. 296 (1972); Note, On Instructing Deadlocked Juries, 78 YALE L.J. 100 (1968); Note, Due Process, Judicial Economy and the Hung Jury; A Reexamination of the Allen Charge, 53 U.VA.L.REV. 123 (1967); and Commit, Deadlocked Juries and Dynamite: A Critical Look at the Allen Charge, 31 U.CHI. L.REV. 386 (1964).

Furthermore, change in the Allen instruction has been called for by attorneys and judges (See, A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY §5.4 (Draft Approved by the American Bar Association Project on Minimum Standards for Criminal Justice in 1978); SUPPLEMENT TO THE REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, JUDICIAL CONFERENCE OF THE UNITED STATES, 2, 3 (1969).

And yet, despite all of the above authorities, including the above cited Ninth Circuit decision, the Court below limited its analysis of the Allen instruction to only two paragraphs appearing at pages 1584-1585 of Appendix "A" hereto, which contain an almost facetious observation

> "The cases which discuss the assumed effect of the Allen charge are all appealed by defendants who were convicted. Defendants who have been acquitted after giving of the charge have not complained."

II

THE TRIAL COURT'S JURY INSTRUCTION THAT SPECIFIC CRIMINAL INTENT COULD BE IMPLIED FROM "RECKLESSNESS" IS WITHOUT ANY BASIS IN THE FEDERAL SECURITIES STATUTES.

As noted by the Court below (see Footnote 28 of Appendix A hereto), the Trial Court instructed the jury that the defendant's willfulness and knowledge, which is required for criminal conviction, may be inferred upon a finding that the defendant

> "recklessly states as facts matters of which he knew he was ignorant . . . . [that is,] reckless, deliberate indifference to or disregard for truth or falsity . . ."

Both in trial and on appeal, counsel for petitioner Lichtig objected to the use of this instruction on the following grounds:

1. There is no statutory authority for "criminal recklessness" in the securities area;

2. There is no case law authorizing this jury instruction, especially in light of Ernst and Ernst v. Hochfelder, supra; and

3. To the extent that "recklessness" is determined by reference to the generally accepted accounting practices ("GAAP" also referred to as "GAAS"), the jury instructions failed to specify just what those standards were, and no evidence was presented by the prosecution as to the GAAP or GAAS operative at the time petitioner Lichtig allegedly acquired criminal scienter (1968-1969). The Court below admitted at page 1609 of Appendix A hereto that the only evidence as to GAAP was the standards issued in 1973 by Committee on Auditing Practice,

American Institute of Certified Public Accountants ---which was after the EFCA fraud was disclosed to the public. And yet at pages 1600, 1608 and 1610-1611 of Appendix A, the Court below refers to Lichtig's failure in 1968-1969 to comply with GAAP and GAAS not issued until 1973.

Such ex post facto evaluation of criminal scienter is reversible error.

The importance of this "reckless disregard" issue is highlighted by the following undisputed facts, which establish that Lichtig's guilty verdict was based on the "recklessness" instruction and was not based upon any finding that Lichtig actually knew about the EFCA fraud.

1. The perpetrators of the EFCA fraud, Evans, Levin, Sultan and Lowell testified at trial and Goldblum later testified that Lichtig did not actually know about the EFCA fraud and that great efforts were made to hide the fraud from the auditors.

2. That the only knowing participants in the EFCA fraud in 1968-69 (the key years for Lichtig's criminal scienter) were Goldblum, Lowell, and Evans. (See also trial judge's summation at page 1608 of Appendix A hereto, which also establishes Lichtig's ignorance of the EFCA fraud in its early 1968-1969 stage.)

3. That in the beginning of 1969, Goldblum made Lowell, and not petitioner Lichtig, the man to present figures to the auditors (see footnote 24 of Appendix A hereto). From that point on, Lichtig handled only administative functions at EFCA.

4. That Lichtig's criminal scienter for all years covered in the Indictment was based upon knowledge he acquired as an auditing accountant in 1968-1969 and his failure in later years to do certain things as an EFCA employee.

The Court below stated at pages 1609 and 1611 of Appendix A hereto that United States v. Natelli, 527 F.2d 311 (2nd Cir. 1975), cert. denied, 425 U.S. 394 (1976) and United States v. Simon, 425 F.2d 796 (2nd Cir. 1969) justified the "recklessness" jury instruction given below. However, that is not correct. As was brought to the attention of the Court below, the jury instruction during the trial in Simon included the express admonition on three separate occasions that the jury must find knowing cancealment with "intent to defraud" in order to convict. The government in presenting the jury instruction below left out that key language from the Simon instruction.

United States v. Natelli, supra, does not justify the "recklessness" jury instruction below because of two reasons:

1. Ernst and Ernst v. Hochfelder, supra, has knocked out the legal underpinnings justifying the Natelli "recklessness" instruction; and

2. Even if Ernst and Ernst v. Hochfelder, did not exist, the theory of criminal liability imposed against Lichtig below is a new twist and extension of Natelli that goes beyond what the statutesand the Constitution allow.

The justification of the "recklessness" instruction in Natelli is based upon a superstructure of Rule 10b-5 civil case law which has been rejected by this Court. In Ernst and Ernst v. Hochfelder, this Court determined that the legislative history behind the federal securities statutes did not support the judically created Rule 10b-5 theory of civil liability for negligence. Petitioner submits that stricter standards of statutory interpretation must apply for criminal liability, and pursuant to those standards, there is no authority for putting someone in jail under the federal securities statutes for "recklesness".

Furthermore, even if this Court had not adopted this new stricter standard in construing and enforcing the federal securities statutes, the "recklessness" jury instruction given below is still not justified by United States v. Natelli, supra. This is because the theory of criminal liability asserted against Lichtig below is broader and more "negligent" oriented than the theory asserted against the Natelli defendants.

It must be remembered that the Natelli Court stressed that its ruling did not apply to an auditor's general duties,

> "but what these defendants had a duty to do in these unusual and highly suspicious circumstances." 527 F.2d at 323.

The "unusual and highly suspicious circumstances" did not exist in the case below. A comparison of the facts and criminal liability duties asserted below and against the Natelli defendants evidences this crucial difference. The Natelli Court made clear at 525 F.2d 316 that the accountant was not being charged with a criminal violation with respect to his decision to permit an adjustment to be made on the audited company's book after the close of the fiscal year, which as a result showed an additional 1.7 million dollars in sale listed as "unbilled accounts receivable." What the Natelli accountants were charged with and convicted on was their failure in the following year to make any adjustments concerning that 1.7 million dollars accounts receivable figure even after the accountant actually knew that the company had written off over one million dollars of this 1.7 million dollars sales figure. Thus, the Natelli Court made clear at 527 F.2d 316-317 that Natelli was knowingly concealing a loss of over one million dollars and was intentionally burying "the retroactive adjustment which should have shown a material decrease in earnings for the fiscal year. . ."

This is not the situation in the case below. As noted at pages 1601-1602 of Appendix "A" hereto, the Court below found that Lichtig was responsible for two "judgmental" errors concerning the 1968-69 EFCA audit. (One error was the listing of one account receivable, "recips", under another category of accounts receivable, the funds due to EFCA from its clients under various EFCA funding programs. The other error was failure to adequately confirm certain collateral stated by Templeton to be held by EFCA on funded loans.) Both of these errors were in the nature of the judgmental classification error made by the Natelli accountants, which the Natelli Court expressly held was not being asserted therein as a criminal violation.

Nowhere is it stated in Appendix "A" hereto, and nowhere did the evidence in the Court below establish, that Lichtig was in the same actual knowledge situation that existed in Natelli. In order for the case below to be similar to Natelli, the evidence below would have to show that at some point after the 1968-1969, Lichtig acquired actual knowledge that the "recips" income did not exist, or that the "collateral held by EFCA" in the FLAR account did not exist.

Because the evidence below never established that Lichtig actually knew that these items did not exist, then the theory of criminal liability asserted against Lichtig below can only rest upon the theory which the Natelli Court expressly stated at 527 F.2d 316 did not apply to the Natelli accountants: a judgmental decision as to how to describe certain income and assets of the audited corporation. It must be stressed that the government's own expert witness below, Mr. Grosman, testified that Lichtig's handling of the "recips" and the FLAR collateral was a "judgmental" matter.

To make matters even worse, Lichtig's "judgmental" decision concerning the 1968 - 1969 EFCA audit was not even judged in light of GAAP or GAAS existing at that time. The only evidence introduced by the government was certain standards which had been issued by the Committee on Auditing Procedure, American Institute of Certified Public Accountants in 1973, the year of the collapse and disclosure of the EFCA fraud. Needless to say, after the EFCA fraud was revealed to the public, the GAAP and GAAS were radically changed to standards far higher than those existing at the time of Lichtig's purported "crime".

If the government should argue in its oppostion to this Petition that Lichtig was also convicted for conducting an inadequate audit, then this Court should consider the fundamental question as to how an accountant can be tried and convicted for an inadequate audit when the government's own witnesses testified that over half of the accountants' work papers were never submitted into evidence. In light of the fact that the EFCA fraud proceeded for years in fooling many accountants from, for example, the SEC, the IRS, Haskins & Sells, Peat Marwick and Mitchell, Seidman & Seidman, and Coopers & Lybrand) how can an accountant be put into a jail for "not doing more" when the evidence introduced against him did not include over half of his work papers? Clearly the evidence leaves open the reasonable doubt that Petitioner Lichtig did do more, but like all those other accountants who were never indicted, more just was not enough due to the tremendous lengths the EFCA management went to to hide the fraud---a ploy that succeeded for years.

III

PETITIONER LICHTIG HAS BEEN TRIED AND CONVICTED UNDER AN UNCONSTITUTIONAL CRIMINAL STANDARD OF "RECKLESSNESS".

Basic constitutional rights questions arise when the government succeeds in obtaining the conviction of people by taking the superstructure of the Rule 10b-5 case law concerning civil liability for negligence and recklessness, and transfers into a theory of criminal liability.

This Court has already expressed in Ernst & Ernst v. Hochfelder and Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), that the scope of civil liability for violation of the securities statutes was being expanded beyond what the statutes authorized and was causing uncertainty among accountants and other people in the securities field as to the scope of civil liability for their action. If such considerations justify the results in Ernst & Ernst v. Hochfelder and Blue Chip Stamps, then they a fortiori justify granting the instant Petition for Writ of Certiorari, because criminal liability is at stake.

In Screws v. United States, 325 U.S. 91 (1945), this Court grappled with this fundamental question of whether a defendant is being tried and convicted under a sufficiently specific criminal standard. In that decision, it was noted that the

> "constitutional requirement that a criminal statute be definite serves a high function. It gives a person acting with reference to the statute fair warning that his conduct is within its prohibition. This requirement is met when a statute prohibits only 'willfull' acts. . . 'Willfully' merely adds

> a certain state of mind as a prerequisite to criminal responsibility of the otherwise proscribed act. If a statute does not satisfy the due-process requirement of giving decent advance notice of what it is, which, if happening, will be visited with punishment, so that men may presumably have an opportunity to avoid the happening . . ., then 'willfully' bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable. 'Willfully' doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, it is not rendered sufficiently definite by that unknowable having been done 'willfully'. It is true also of a statute that cannot lift itself up by its bootstraps." 325 U.S. at 103-104, 151-154 (emphasis added).

Despite the assertions of the Securities and Exchange Commission to the contrary, the executive branch of the United States Government has also supported this fundamental requirement for specific criminal standards.

> "This is the basic meaning of 'justice' in criminal cases. One who believes that criminals should be dealt with 'justly' believes, among other things, that punishments can be inflicted on criminals without great danger of revolt or

> rebellion, providing sufficient advance notice is given in the form of rules. Especially in Western society, with long traditions of barring ex post facto legislation [there are] elaborate systems for warning citizens that nonconformity of certain kinds will have punishment as its consequence. . . . An important function of the criminal law, so far as maintaining consent of the governed is concerned, is providing the 'advance notice' necessary for justice." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME, 25, 45-56 (1967) (emphasis in original).

Petitioner Lichtig's conviction for "recklessness" raises these precise fundamental constitutional issues. Therefore, Petition for Writ of Certiorari should be granted.

IV

CONCLUSION

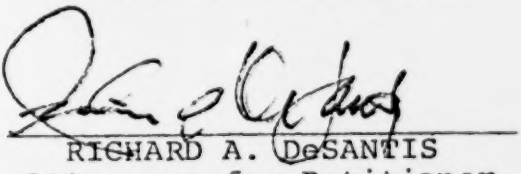
Regardless of whether this Court ultimately supports Lichtig's position, this Petition should be granted because his conviction raises unique and fundamental constitutional questions.

For the foregoing reasons, this Court should grant a writ of certiorari.

Dated: August 17, 1978.

Respectfully submitted,

LAW OFFICES OF
RICHARD A. DeSANTIS



RICHARD A. DeSANTIS
Attorneys for Petitioner

APPENDIX A

The Opinion of the Court
in United States v. Julian S.H. Weiner,
578 F 2d 757 has not been filmed.

RECEIVED

JUN 2 1978

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. JULIAN S. H. WEINER; MARVIN AL LICHTIG; and SOLOMON BLOCK, Appellants.	)	No. 75-2973 ORDER

Appeal from the United States District Court for the Central District of California

Before: CHOY and GOODWIN, Circuit Judges, and THOMPSON*, District Judge.

On May 26, 1978, appellants Weiner and Block filed a petition for rehearing with a suggestion for rehearing en banc.

On May 30, 1978, appellant Lichtig filed a petition for rehearing.

The panel as constituted in this case has voted to amend the opinion filed May 15, 1978, in the following particulars:

At page 10, line 5, of the typewritten opinion (page 1587 of the printed slip opinion, top of right-hand column), starting with "Lichtig's present claim", delete the remainder of the paragraph and substitute the following language:

> Lichtig claims he discovered the existence of the agreement on May 7, 1976, almost a year after the conclusion of the trial. However, the record on appeal does not contain any

*The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

APPENDIX "B"

> evidence of the agreement or of the government's knowledge that such an agreement existed. The issue is therefore not properly before us.

At page 35, line 20, of the typewritten opinion (page 1601 of the printed slip opinion, line 10, right-hand column), delete the period after the word "statement" and insert before "The untrue" the following language:

> which stated that an independent audit of the financial statement using GAAS had found it to reflect truthfully the financial condition of the company and its operations and to have been prepared according to GAAP.
>
> Count 76 charges that Lichtig and another defendant "wilfully made and caused to be made untrue statements of material fact" or "wilfully omitted and caused to be omitted statements of material fact" in the December registration statement.

At page 36, lines 15-18, of the typewritten opinion (page 1602 of the printed slip opinion, lines 12-16, left-hand column), delete the two sentences beginning "The SEC had previously ruled" and ending "to receive such money."

At page 48, line 11, of the typewritten opinion (page 1608 of the printed slip opinion, line 4, right-hand column), substitute "Lichtig" for "Block".

With the opinion so amended, the panel has voted to deny the petitions for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the proposed amendments, and of the

suggestion for rehearing en banc, and no judge has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

It is ordered that the opinion in this case is amended as set forth above; the petition for rehearing filed by appellant Lichtig is denied; and the petition for rehearing filed by appellants Weiner and Block is denied and their suggestion for rehearing en banc is rejected.

AFFIDAVIT OF SERVICE IN COMPLIANCE
WITH SUPREME COURT RULE 33(3)(c)

STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1901 Avenue of The Stars, Suite 700, Los Angeles, California 90067.

On August 18, 1978, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on the parties in this action pursuant to Supreme Court Rule 33(1) and (2)(a) by placing true copies thereof in an envelope addressed as follows:

Solicitor General Department of Justice Washington, D.C. 20530	U.S. Attorneys Office 312 North Spring Street Los Angeles, California 90012

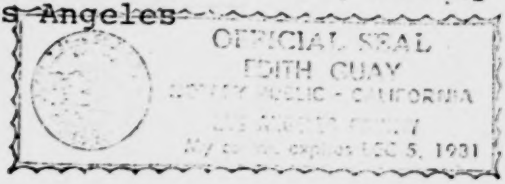
and by then sealing said envelope and depositing same, with postage thereon fully prepaid, in the United States mail at 1901 Avenue of The Stars, Level "A", Los Angeles, California 90067.

Defendants Weiner and Block are not Petitioners herein, but may file their own pleading.

Joy Rosemarie Grako
JOY ROSEMARIE GRAKO

Subscribed to and sworn to before me this 18th day of August, 1978

Edith Guay
Notary Public in and for the State of California, County of Los Angeles



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-284

MARVIN A. LICHTIG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAW OFFICES OF RICHARD A. DeSANTIS
RICHARD A. DeSANTIS

Attorneys for Petitioner
MARVIN A. LICHTIG

1901 Avenue of The Stars
Suite 700
Los Angeles, California 90067

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-284

MARVIN LICHTIG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAW OFFICES OF RICHARD A. DeSANTIS
RICHARD A. DeSANTIS

Attorneys for Petitioner
MARVIN A. LICHTIG

1901 Avenue of the Stars
Suite 700
Los Angeles, California 90067

INDEX TO APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

FILED

MAY 15, 1978

EMIL E. MELFI, JR.

CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Appellee, v. JULIAN S. H. WEINER, MARVIN AL LICHTIG; AND SOLOMON BLOCK, Appellants.	)	NO. 75-2973
	)	OPINION

Appeal from the United States District Court for the Central District of California

Before: CHOY and GOODWIN, Circuit Judges, and THOMPSON,* District Judge.

PER CURIAM:**

---

*The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation

**All three members of the panel shared equally in the writing of this decision.

⊥ Julian Weiner, Marvin Lichtig, and Solomon Block appeal their respective convictions for securities fraud arising out of their employment as auditors of Equity Funding Corporation of America (Equity Funding) during the time covered by the indictment. ⊥1582

Equity Funding was incorporated in 1960 to sell life insurance, mutual funds, and "equity funding" programs.[1] The ⊥company operated legitimately and profitably until 1964, when, the government proved, it began to publish inaccurate and false financial statements. Equity Funding was accused of massive fraud in overstating its income and claiming nonexistent assets in order to increase the market value of its stock. ⊥1583

Wolfson, Weiner, Ratoff, and Lapin were the independent public accountants for Equity Funding from 1961 until 1971. In early 1972, the Los Angeles branch of the Wolfson, Weiner firm joined with the accounting firm of Seidman & Seidman. The combined firm served as Equity Funding's independent public accountant

until the exposure of the fraud in 1973.

Julian Weiner was the Wolfson, Weiner partner in charge of the audits of Equity Funding from 1961 to 1973. He was convicted of six counts of securities fraud, 15 U.S.C. §§ 77x, 77q(a), for accounting practices which fraudulently overstated the income and assets of Equity Funding and of four counts of willfully making untrue statements to the Securities Exchange Commission (SEC) and the New York or Pacific Coast Stock Exchanges, in violation of 15 U.S.C. §§ 77x, 77f, 78ff, 78m.

Marvin Lichtig, as an employee and later as a junior partner of Wolfson, Weiner, supervised the audit field work of Equity Funding for the audits between 1963 and 1968. He reported directly to Julian Weiner. From 1968 until 1973, Lichtig served as an officer of Equity Funding and signed registration statements as the principal accounting officer of the company. Lichtig was convicted of the same six counts of securities fraud as Weiner.

Lichtig was also convicted of seven counts of filing false statements with the SEC and the New York or Pacific Coast Stock Exchange in violation of 15 U.S.C. §§ 77x, 77f, 78ff, 78l,78m.

Solomon Block was employed by Wolfson, Weiner in 1968 and replaced Lichtig as the supervisor of field audits. Block served as supervisor for the 1969 through 1972 audits. Block was charged with the same six counts of securities fraud as Weiner and Lichtig, but Block was convicted of only five of the counts. Block was convicted of two counts of making false statements to the SEC and the New York or Pacific Coast Stock Exchanges in violation of 15 U.S.C. §§ 77x, 77f, 78ff, 78m.

A. UNANIMOUS VERDICT

Defendants argue that the convictions must be reversed because the jury verdict was not unanimous. This challenge is based on juror affidavits.

The jury returned a verdict of guilty, and each member of the panel was polled. The judge asked "please

indicate by answering if the verdicts just read are your verdicts," and each juror responded individually in the affirmative. The verdicts were received and the jury was discharged. Half an hour later, a juror went to the judge's chambers and said that she had never voted "guilty", but rather had voted "guilty with reservation" during the jury's deliberations. She further stated that she understood that the jury's verdict was eleven "guilty" and one "guilty with reservation", and was confused by the events in the courtroom when she responded affirmatively that the verdict rendered was her verdict. Two other jurors made affidavits to
1564 support this juror's statement that she had always qualified her "guilty" vote "with reservation".

The defendants moved for a new trial, based on the affidavits of the three jurors. The district judge denied the motion, holding that the affidavits were not admissible to impeach the verdicts.

The district court followed established law. Jurors may not impeach their own verdict. McDonald v. Pless, 238 U.S. 264 (1915). This rule, with narrow exceptions, is codified in Fed. R. Evid. 606(b).

Defendants argue that they are not seeking to impeach the verdict. They contend that the verdict rendered in court was not the true verdict of the jury and the affidavits should be admissible to prove this fact. They cite Fox v. United States, 417 F.2d 84 (5th Cir. 1969). In that case, a juror remained silent when polled, and other jurors by affidavit said they thought a verdict by a majority was sufficient. The court held that there was no legal verdict. But here there was a verdict, and upon a poll of each juror in open court it was unanimous. Even if the defendants were able to prove that one juror had consistently voted "guilty with reservation", the only purpose of such testimony would be to impeach the verdict. The meaning of "with reservation" would thus be left to the in-

genuity of counsel and the vagaries of social behavior in every case.

The juror answered in the affirmative when asked if "guilty" was her verdict. Many jurors have some second thoughts about their verdicts. "Beyond a reasonable doubt" need not exclude all doubt. To permit this juror to contradict this verdict by an explanation that her vote was "guilty with reservation" would sanction the impeachment of any verdict in which a juror could be found who was willing to repudiate the answer he gave when polled.[2] Opportunities for harassment of jurors and jury tampering would abound. Such a burden on the jury system could not long be tolerated.

B. THE "ALLEN CHARGE"

The defendants also argue that the jury was coerced by the giving of the Allen charge.[3] After 5 days of deliberations the foreman of the jury notified the judge that "one of the members of our jury feels unable to participate in deliberations with the rest

of us." After ascertaining that the juror was not suffering from a physical or mental disability, the judge gave a modified Allen instruction substantially as set out in E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 18.14 2d ed., (1970). (This instruction is §18.14 in the Third Edition, 1977.)

This court has consistently upheld this form of the Allen charge. Sullivan v. United States 414 F.2d 714 (9th Cir. 1969). The cases which discuss the assumed effect of the Allen charge are all appealed by defendants who were convicted. Defendants who have been acquitted after the giving of the charge have not complained. Upon review of all the circumstances of the case, we hold 1565 that the supplemental instruction was not coercive.[4]

C. PREJUDICIAL COMMUNICATIONS

During the trial, the prosecutor learned that two jurors had been on an elevator during a conversation between a government attorney and a government

witness. The prosecutor notified the trial judge, who called a conference in chambers with all parties to the conversation plus defense counsel. The judge determined that nothing prejudicial had been said. There was no motion for a mistrial. Defense counsel now assert that there was something sinister about the event. The record, however, reveals no reason for disturbing the trial court's descretion in handling the matter.

The same juror who had expressed her reservations in the jury room and later in a posttrial affidavit also stated in her affidavit that during the deliberations she had initiated a conversation with the bailiff by asking whether the judge expected a verdict. She said the bailiff told her that he didn't know, but he assumed that the judge would "like" a verdict. The bailiff, by affidavit, denied the conversation. In any event, the defendants fail to show how such a conversation, if it occurred, could have prejudiced anyone. Since the alleged conversation occurred, if

it occurred at all, nearly a week after the judge had given the Allen charge earlier complained of, it should have been apparent to even the most obtuse juror that a verdict would be a welcomed development. We find no basis for charging the trial judge with an abuse of discretion for refusing to grant a new trial upon this sort of clutching at straws. It was a long trial, and such trials frequently produce a number of imperfections. It is to the credit of the experienced trial judge that this is the sort of assignment of error to which the appellants apparently must look in their search for reversible error.

D. ALLEGED MISCONDUCT BY PROSECUTOR

Appellant Lichtig claims that the prosecutor made an impermissible reference in final argument to his and Block's failure to take the stand. Block's attorney, in his part of the summation, had made a reference to certain evidence thought to be exculpatory of Block. The prosecutor in his final

argument referred to "Julian Weiner's exculpatory testimony" and the absence of other testimony on the point. None of these comments trespassed upon the rule against calling attention to failure to testify. The jury knew very well that neither Block nor Lichtig had testified, and, if this failure left some unanswered questions in the minds of jurors, that was a risk that had been assumed long before final argument. The government took no unfair advantage of the situation, and there was no error in refusing a new trial on this score. The trial court carefully instructed the jury about the presumption of innocence, the burden of proof, and the right of the defendant to refrain from testifying.

1586 ⊥ Lichtig and Block also complain about the exploitation by the prosecutor of the term "reciprocal income"[5] during the course of the trial. The point is frivolous. "Reciprocal income" and "reciprocals" were terms commonly used in the reporting of inflated or non-existing assets. The trial court

carefully instructed the jury that there was nothing illegal about reciprocal income. The illegal conduct consisted of making false or exaggerated reports about "reciprocal" and other kinds of income.

E. ALLEGED IMPERMISSIBLE RESTRICTION OF CROSS-EXAMINATION OF WITNESS LOWELL

The interrogation of Samuel Lowell, one of the government's principal witnesses, commenced in the afternoon of Friday, February 21, 1975. At the close of that session the trial was continued to 9:30 a.m. on Tuesday, February 25, 1975. The direct examination continued through Tuesday and for a very short time Wednesday morning, when the case was continued to Thursday on motion of defense counsel. Cross-examination by Mr. Abeles for defendant Weiner lasted all day Thursday and all day Friday. Mr. DeSantis, representing defendant Lichtig, commenced cross-examination late Friday afternoon. On adjournment, the trial was continued to Tuesday, March 11. Mr. DeSantis cross-examined

Lowell all day Tuesday, and half of Wednesday morning. Mr. Markowitz, representing defendant Block, then took over and completed his questioning in the middle of the afternoon.

In addition, during the government's case, the court permitted defense counsel to recall Mr. Lowell for further cross-interrogation on March 20, 1975.

During cross-examination there were numerous and repetitive attacks upon the credibility of the witness. Counsel probed Lowell on extramarital relationships and participation in fraudulent conduct not charged in the indictment. It will serve no useful purpose to detail the specific instances in which defendants claim that cross-examination was improperly curtailed or restricted. With respect to each such assignment of error, the impeaching information came to the attention of the jury. The attack is only upon the court's refusal to permit counsel unrestricted license to exhaust the details of the particular circumstance or transaction. There was

no error.

The scope and extent of cross-examination is within the discretion of the trial court, and the court's limitation of cross-examination will not result in reversal unless it is clear that a defendant was thereby denied his constitutional right to confrontation. Smith v. Illinois, 390 U.D. 129, 132 (1968); United States v. Haili, 443 F.2d 1295, 1299 (9th Cir. 1971); Enciso v. United States, 370 F.2d 749 (9th Cir. 1967).

The court in its discretion may limit cross-examination in order to preclude repetitive questioning, upon determining that a particular subject has been exhausted, or to avoid extensive and time-wasting exploration of collateral matters. See e.g. United States v. Zane, 495 F.2d 683, 695 (2d Cir. 1973); United States v. Miller, 473 F.2d 600 (1st Cir. 1972).

The trial court has a duty to control cross-examination to prevent it from unduly burdening the record with
⊥ cumulative or irrelevant matter. Alford ⊥587

v. United States, 282 U.S. 687, 694 (1931); United States v. Carrion, 463 F.2d 704, 707 (9th Cir. 1972). This duty includes a specific duty to prevent counsel from confusing the jury with a proliferation of details on collateral matters. United States v. Carrion, 463 F.2d at 707. See also Fed. R. Evid. 403 and 608(b).

F. ACCESS TO AND ADMISSIBILITY OF EXCULPATORY EVIDENCE

Apparently two pages of notes made by prosecutor Rathje of an interview with Fred Levin, a government witness, were supplied to the defense and used by the defense in cross-examination. The government then offered the notes as evidence. Defendants objected. They wanted the notes to be censored before submission to the jury. Later the government withdrew the offer. The exhibit was never reoffered by defense counsel. The alleged error was not preserved for appellate review. This is certainly not a situation, as suggested by defense counsel, where the government has withheld or suppressed ex-

culpatory material as was the case in Brady v. Maryland, 373 U.S. 83, 86-88 (1963). See United States v. Agurs, 421 U.S. 97, 107-14 (1976).

Appellant Lichtig says his constitutional rights were infringed by the government's failure to disclose a pretrial agreement (in a companion civil action) between the trustee in reorganization and the previously mentioned Lowell which allegedly absolved Lowell of civil liability in the Equity Funding litigation. Here, the verdict of the jury was returned on May 20, 1975, defendants were sentenced on July 14, 1975, and appeals were taken on July 25, 1975. Lichtig's present claim of error is based on an application for a continuance made on May 7, 1976, in the civil litigation, for the purpose of consummating a settlement with respect to Lowell. Obviously, none of this is part of the record on appeal. Since the agreement Lichtig would have had the government disclose was not made until a year after trial, it was hardly susceptible of nondisclosure during the

trial. There was no infringement of a right to exculpatory material.

Lichtig also complains of the denial of his oral motion during the trial for an order requiring the government to lodge all SEC transcripts and statements and interviews with witnesses by the Federal Bureau of Investigation, the postal service, or anyone else that were in possession of the United States Attorney, for the court's examination to ferret out possible Brady material. As the Supreme Court noted in United States v. Agurs, 427 U.S. at 106, a request "for 'all Brady meterial' or for 'anything exculpatory'" is equivalent to no request at all. The trial judge need not accord the slightest heed to such a shotgun approach. This attempt to create error has as little merit as the one preceding it.

G. DISQUALIFICATION OF U.S. ATTORNEY'S OFFICE

Appellant Block asserts error in the refusal of the trial judge to disqualify the United States Attorney's office from prosecuting the case. An attorney em-

ployed by the law firm of Nelson, Liker & Merrifield while that firm represented Weiner and Block in connection with matters arising out of the Equity Funding fraud left the firm and went to work for the SEC.

⊥ Appellant suggests, but the record ⊥1588
does not confirm, close cooperation between the SEC and the Department of Justice in the management of this prosecution.

In order to disqualify the U.S. Attorney's office, the court would first have to impute to the former private attorney knowledge of the Equity Funding litigation possessed by other members of his former law firm. Second, the court would have to impute this same knowledge to the other attorneys at the SEC. And third, the court would have to impute all SEC knowledge to the office of the United States Attorney by virtue of the alleged cooperation between the Department of Justice and the SEC.

The first step of the exercise may be possible (see Lasky Brothers v. War-

ner Brothers Pictures, Inc., 224 F.2d 824, 826-27 (2d Cir. 1955)), but the logic thereafter become tenuous. Problems concerning the imputation of knowledge to government attorneys are sui generis. A free flow of information may be assumed to exist within a law partnership, but the size and diversity of many government agencies makes similar assumptions about agencies wholly unrealistic. See United States v. Standard Oil Co., 136 F. Supp. 345, 360-63 (S.D.N.Y. 1955). There is nothing in the record before us to support a finding that the named employee of the SEC ever investigated or passed upon the subject matter of the instant case, or that information pertaining to this case ever reached him. Cf. General Motors Corp. v. City of New York, 501 F.2d 639, 651 (2d Cir. 1974). As this court noted in Gas-a-tron of Arizona v. Union Oil Co., 534 F.2d 1322, 1325 (9th Cir. 1976), we will not disturb the district court's exercise of its discretion in dealing with challenges to government attorneys as long as the record reveals no sound

basis for disqualification. The record in this case supports the district court's refusal to disqualify the United States Attorney's office.

H. COCONSPIRATOR HEARSAY EXCEPTION

The government originally charged twenty-two defendants on 105 counts. Twenty-two of those counts involved Weiner, Lichtig and Block. Count 1 alleged a conspiracy between Weiner, Lichtig, Block and some of the other defendants.

Two counts involving Weiner, Lichtig and Block were dismissed after presentation of the prosecution's case in chief. At the close of all the evidence, the government withdrew two other counts - the conspiracy charge and a mail-fraud charge (Counts 1 and 2). The court dismissed those counts, leaving sixteen counts (Counts 6, 10-14, and 75-84) for presentation to the jury.

At the time the conspiracy count was withdrawn, the defendants moved to strike all testimony admitted under the

coconspirator exception to the hearsay rule. Previous timely exceptions had been made to the admission of the testimony. The motions were denied. Appellants now contend that the dismissal of the conspiracy count by the court made inadmissible all statements previously received under the exception. Alternatively, they claim that even if there was no absolute bar to the testimony, it was inadmissible because the standards of admissibility under the exception had not been met since there was insufficient proof aliunde of the conspiracy and and defendants' connection with it.[6]

1589 ⊥ Defendants' first contention, that the mere dismissal of the conspiracy count mandated striking all testimony previously admitted under the hearsay exception, is frivolous. The eventual submission of the charge does not determine the admissibility of the evidence.

This circuit has established that coconspirator hearsay is admissible only when a foundation is laid to show that: (1) the declaration was in furtherance

of the conspiracy, (2) it was made during the pendency of the conspiracy, and (3) there is independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant to it. United States v. Snow, 521 F.2d 730, 733 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976). See also United States v. Testa, 548 F.2d 847, 852 (9th Cir. 1977); United States v. Calaway, 524 F.2d 609, 612 (9th Cir. 1975), cert. denied, 424 U.S. 967 (1976); Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964). It is not necessary for a charge of conspiracy to have been brought in order for coconspirator hearsay to become admissible. Dutton v. Evans, 400 U.S. 74 (1970); United States v. Williams, 435 F.2d 642 (9th Cir. 1970), cert. denied, 401 U.S. 995 (1971); Lee Dip v. United States, 92 F.2d 802, 803 (9th Cir. 1937), cert. denied, 303 U.S. 638 (1938). Nor is the exception limited to trials where coconspirators are also codefendants. United States v. Randall, 491 F.2d 1317 (9th Cir. 1974);

United States v. Williams, supra.

The trial judge initially decides whether the declarations of coconspirators are admissible. There is no set order of proof. The admission of the evidence subject to a motion to strike because of the insufficiency of proof of the necessary preliminary facts is well within the trial judge's discretion. United States v. Testa, 548 F.2d at 852; United States v. Knight, 416 F.2d 1181, 1185 (9th Cir. 1969).

In this case the disputed statements were clearly made during and in furtherance of the conspiracy. The only question is whether there was sufficient independent evidence of a conspiracy and the defendants' connection to it.

The quantum of independent proof necessary for the application of the coconspirator heresay exception is sufficient, substantial evidence to establish a prima facie case that the conspiracy existed and that the defendant was a part of it. Glasser v. United States, 312 U.S. 60 (1942); United

States v. Testa, 548 F.2d at 853; United States v. Calaway, 524 F2d at 612; United States v. Spanos, 462 F.2d 1012 (9th Cir. 1972); Carbo v. United States, supra.

Once the existence of a conspiracy has been established, independent evidence is necessary to show prima facie the defendant's connection with the conspiracy, even if the connection is slight.[7] United States v. Freie, 545 F.2d 1217, 1221-22 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); United States v. Knight, supra.

1590

[7] Several officers and officials of Equity Funding who had pleaded guilty, including Jerome Evans, Treasurer until 1968, the earlier-mentioned Samuel Lowell, Controller, and Michael Sultan, Assistant Controller, testified for the prosecution. Other Equity Funding employees, and auditors and SEC examiners who had reviewed the company's financial records after discovery of the fraud also testified.

It is undisputed that the financial

records of Equity Funding did not accurately reflect the financial condition of the company and its subsidiaries. Testimony about particular fraudulent financial transactions and recordkeeping abounds in the record. For example, both Sultan and Lowell testified about the purchase of Investors Planning Corporation of America (Investors Planning) in 1969. The total cost of the acquisition was approximately $10 million, $2 million assigned to book value and approximately $8 million to excess cost that included the value of the sales force acquired and of the contractual plans acquired.[8]

Thereafter, because of a shortfall in the Funded Loans and Receivables Account, the prime source of the company's paper profit, it was decided to revalue the future premiums due under an account entitled "Clients Contractual Receivables," which allegedly represented the trail commissions[9] due on the Investors Planning programs. In order to substantiate the transaction, Stanley Goldblum, the president of Equity Fund-

ing, wrote a letter to the auditors informing them that a sale was in process and that he would personally guarantee a purchase of the trail commissions for close to the amount of the recorded value. After debits for commissions payable, Equity Funding increased its paper income by over $13 million by this accounting treatment of the contractual commissions. No real sale was anticipated. Lowell and Sultan testified that $2 million in funds from Equity Funding was routed through two shell corporations in Europe and then paid back to Equity Funding as the supposed down payment on the purchase. Thus, Equity Funding paid itself, and the value recorded was never received.

Other improprieties testified to by various Equity Funding employees included falsification of confirmations for various assets claimed by Equity Fundint. Another example was the insertion of a $2 million plug in the total of the detail[10] making up the Funded Loans Receivable portion of the Funded Loans and Accounts Receivable account. The

$2 million did not appear on the computer printouts of the detail, but only in the total. In later years the detail sheets substantiated the total, but the full account numbers were not given and
11591 accounts were randomly duplicated within the detail until the desired sum was reached. In addition, various notes receivable were created with shell corporations, some of which continued on the books at full value even after the date of maturity despite non-payment.

The testimony of the various Equity Funding officials about their personal participation in and knowledge of the various schemes showed an obvious common purpose and practice intended to inflate falsely the reported value of Equity Funding. Auditors and examiners who reviewed the financial records under the direction of the company's receiver and the SEC confirmed the testimony of the employees.

The existence of a conspiracy to provide false information to the public and to the SEC is firmly established.

Defendants' second contention, that there was insufficient independent evidence of the connection of each defendant to the conspiracy, also fails. The record again supplies ample evidence upon which the trial judge could have determined that prima facie proof existed to establish the necessary connection of each defendant with the conspiracy.

The lack of agreement between the financial statements and the actual finances of Equity Funding is relevant because each defendant, Weiner, Lichtig, and Block, was involved in at least one of the audits as an independent auditor. Weiner and Lichtig were responsible for the 1968 audit, and Weiner and Block were responsible for the audits prepared for 1969, 1970 and 1971. Lichtig became Treasurer of Equity Funding during the 1968 audit. Lichtig had bought shares of Equity Funding while still acting as an independent auditor. Defendants each had several meetings with Equity Funding officials involved in the financial manipulations. Frank West, a

CPA employed by Wolfson, Weiner, Ratoff and Lapin, who worked on audits of Equity Funding from 1969 through 1972, and Samuel Lowell both testified to conversations with defendants about questionable transactions.

The workpapers of defendants did not reveal requests for confirmation of the amount of collateral being used as security for outstanding funded loan programs, and for the amount of internally held funding programs. Various arithmetical calculations that were incorrect in the original worksheets or Equity Funding calculations were not corrected, even in one case where the worksheets revealed that the auditors were aware of the mistake. There was much give and take between Weiner, and later Block, and the Equity Funding officials in attempts to develop auditing methods that would show income in amounts the company felt was desirable.

The responsibilities of defendants were also established by testimony regarding their own statements and actions.

Extrajudicial declarations made by defendants themselves are not hearsay, but qualify as independent evidence. United States v. Calaway, 524 F.2d at 613; Klein v. United States, 472 F.2d 847 (9th Cir. 1973). Such evidence included (1) Block directing auditors working under him not to pursue certain areas that involved fraudulent or falsified information despite the auditor's requests for further information, and (2) Weiner suggesting accounting procedures that obscured Equity Funding's true financial situation.

Independent evidence to connect defendants with the conspiracy for the purpose of admitting the hearsay declarations was abundant. Some of the evidence is circumstantial; but circumstantial evidence can provide the necessary quantum of proof. United States v. Calaway, 524 F.2d at 612. Once the judge determines that the hearsay evidence is admissible, the weight to be given that evidence becomes a question for the jury. United States v. Ragland, 375 F.2d 471 (2d Cir. 1967), cert. de-

nied, 390 U.S. 925 (1968); Carbo v. United States, 314 F.2d at 737.

We hold that the evidence heard under the coconspirator hearsay exception to the hearsay rule was properly admitted. A prima facie case was made for the existence of a conspiracy and the involvement of the particular defendants in it.

Defendants further contend that the testimony of Lowell, Sultan, John Templeton (who served as Controller of Equity Funding from 1968 to 1969), and others concerning extrajudicial declarations by Goldblum violated their right of confrontation because the prosecution never called Goldblum as a witness.

Goldblum was called by the defense but refused to testify after asserting his Fifth Amendment right against self-incrimination. Goldblum's extrajudicial statements were admissible as discussed above under the coconspirator exception.

The admissibility of evidence under the coconspirator exception, however,

does not automatically demonstrate compliance with the confrontation clause. United States v. Snow, 521 F.2d 730, 734 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976); United States v. Baxter, 492 F.2d 150 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974).

In Dutton v. Evans, supra, the Supreme Court dealt with a situation where a third party testified to a conversation with Evans's codefendant, Williams, who was tried separately. Williams did not testify at Evans's trial. The Court did not indicate whether Williams was available to testify, and did not address the issue. In dealing with the relationship between the coconspirator hearsay exception and the Sixth Amendment, the Court acknowledged that the confrontation clause does not bar the admission of all hearsay. 400 U.S. at 80. Although the hearsay rule and the confrontation clause have a similar basis, the two do not precisely overlap. 400 U.S. at 82, quoting from California v. Green, 399 U.S. 149, 155-56 (1970). Under Dutton an analysis must be made

to determine whether there are sufficient indicia of reliability to permit the introduction of the hearsay declarations in spite of the lack of opportunity for the defendant to cross-examine the declarant.

United States v. Snow, supra, is instructive in this case. Snow contended that testimony by a DEZ agent regarding declarations of a coconspirator denied his right of confrontation. The government argued that the defendant had been equally free to subpoena the declarant. We held that the testimony contained sufficient indicia of reliability to meet the Dutton v. Evans standards and that:

> "While it is unquestioned that the government has the burden of producing evidence showing the guilt of the accused beyond a reasonable doubt, it does not have the burden of calling every witness whose testimony would support a verdict of guilty, and it need not call a witness, equally available to both sides, merely because cross-examination of such a witness might prove
> 1393 helpful to the defense case." United States v. Snow 521 F.2d at 736.

Goldblum was equally available to both

sides during the trial, and was in fact called by the defense. He chose to assert his constitutional right against self-incrimination, and his testimony thus became unavailable to both sides.[11] The failure of the prosecution to call Goldblum as its witness did not constitute grounds for reversal.[12]

Once Goldblum's refusal to testify and his resulting unavailability are established and cross-examination is thus precluded, the next question is whether there are sufficient indicia of reliability to permit introduction of his declarations without violating the Sixth Amendment.

> "* * * The relevant factual inquiry is whether, under the circumstances, the unavailability of the declarant for cross-examination deprived the jury of a satisfactory basis for evaluating the truth of the extrajudicial declaration.* * *" United States v. Adams, 446 F.2d 682, 683 (9th Cir.) cert. denied, 404 U.S. 943 (1971).

Mancusi v. Stubbs, 408 U.S. 204 (1972); Dutton v. Evans, supra; United States

v. Baxter, 492 F.2d at 177.

Among the factors to be considered in determining the reliability of the hearsay declarations is whether the witness testifying would have had knowledge of the roles and identities of others within the conspiracy. Also significant is whether the witness's recollection of the declarant's statements is likely to be accurate and whether the declarant would have had any reason to have lied to the witness. The court must determine whether cross-examination of the declarant would be likely to show that the declarant's statements were unreliable.[13] Another important determination is whether the evidence is "crucial" or "devastating" to the defense. Dutton v. Evans, 400 U.S. at 87; United States v. King, 552 F.2d 833 (9th Cir. 1976). cert. denied, 430 U.S. 966 (1977); United States v. Snow, 521 F.2d at 735; United States v. Adams, 446 F.2d at 684.

Employing the Dutton approach,[14] we hold that Goldblum's declarations con-

tained sufficient indicia of reliability and were properly admitted. Each of the witnesses testifying about Goldblum's extrajudicial declarations was involved in the day-to-day running of the company. They were officers and employees of Equity Funding, and the conversations to which they testified were directed to the operation of the corporation and the maintenance of its financial records. The witnesses were talking from personal knowledge. Because of their positions within the company and, in some cases, within the conspiracy, it is unlikely that Goldblum would have been lying to them. The testimony of Lowell, Evans, and others who were among the original persons charged also contained statements against their own penal interests, a further badge of reliability.

Finally, none of the declarations was "crucial" or "devastating". There was abundant evidence regarding the manipulation of Equity Funding's financial recordkeeping, and the conversations with Goldblum were not a major component of proof against the defendants.

In fact, so substantial was the other evidence that, even if error, the admission of Goldblum's declarations would have been error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); United States v. Adams, 446 F.2d at 684.

I. ADMISSIBILITY OF LICHTIG WORKPAPERS

Appellant Lichtig alleges error in the receipt in evidence of workpapers produced by Lichtig in 1968. He cites Gallego v. United States, 276 F.2d 914 (9th Cir. 1960). Nothing in Gallego supports this assignment of error.

Lichtig contends that the chain of custody of the workpapers between 1968 and the trial was incomplete and that the workpapers themselves were incomplete. Assuming these insufficiencies, the trial judge has discretion to admit the workpapers into evidence if he "is satisfied that in reasonable probability ** *[they have] not been changed in important respects"; the jury is free to weigh the evidence according to its own

evaluation of its authenticity. Gallego v. United States, 276 F.2d at 917; Williams v. United States, 381 F.2d 20 (9th Cir. 1967). This court said, in United States v. King:

> "It is the function of the trial court to determine whether proffered evidence has enough prima facie trustworthiness to warrant its consideration by the jury, and generally the sufficiency of a showing of authenticity of a writing sought to be introduced into evidence is a matter within the discretion of the trial judge.* * * " 472 F.2d at 7.

In this case, there was substantial testimony from witnesses who had used the workpapers or who knew the handwriting, identifying and authenticating the workpapers. The court did not abuse its discretion. See United States v. Brown, 482 F.2d 1226 (8th Cir. 1973).

J. ALLEGED ERROR IN QUASHING SUBPOENA FOR THE "PARKER REPORT"

Appellant Weiner alleges error in the court's suppression of a subpoena duces tecum for the Parker Report. The Parker Report resulted from an invest-

igation made for the guidance and information of the attorneys retained by the accounting firm of Seidman & Seidman to defend numerous civil actions filed as a consequence of the Equity Funding fraud. Parker was a partner of Seidman & Seidman. Weiner, as noted earlier, was a partner of Seidman & Seidman at the time the report was prepared. Block also joined Seidman & Seidman in the merger with Wolfson, Weiner.

Block's attorney caused a subpoena duces tecum to be issued to the attorneys for Seidman & Seidman for a copy of the Parker Report. The Seidman & Seidman attorneys moved to quash or suppress the subpoena claiming attorney-client and work-product privileges. The motion to suppress Block's subpeona was granted. With respect to Weiner, who
11595 ⊥assigns the error on appeal, the subpoena was never ruled upon. Action on the motion was withheld or suspended at Weiner's request, and the motion was never thereafter properly brought before the court for action. There is no

basis for an assignment of error.

In the reply brief Weiner states: "Weiner had every reason to believe that the 'Parker' report contained totally exonerating information regarding his personal absence from all of the auditing functions at * * * [Equity Funding]." This speculation is unsupported by anything in the record. In the same brief, Weiner seeks to rely on United States v. Agusr, supra, and Brady v. Maryland, supra, to support this assignment of error. How prosecutorial misconduct in a Brady context can be inferred in this situation is not demonstrated.

K. DENIAL OF BLOCK'S MOTION TO SUPPRESS HIS TESTIMONY BEFORE THE SEC

Block contends that he was deprived of his right to counsel during his various appearances at investigative hearings before the SEC. More specifically, Block asserts that counsel who appeared with him during his testimony before the SEC, and upon whose advice he decided to testify, had a conflict of interest because the attorneys' law firm represent-

ed certain accounting firms of which Block was a present or past employee at the same time the attorneys were appearing with Block. The trial court denied Block's motion to suppress his testimony before the SEC, after finding that Block had not been deprived of his right to counsel and that he had voluntarily waived his right to be represented by his own attorney

It is firmly established that a party compelled to appear before an investigation by the SEC has a right to retain counsel. The Administrative Procedure Act, 5 U.S.D. §555(b), provides in pertinent part:

> "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding* * *."

This right to have an independent counsel can, however, be waived. See United

States v. Kutas, 542 F.2d 527, 530 (9th Cir. 1976); United States v. Frame, 454 F.2d 1136, 1138 (9th Cir. 1972); Kaplan v. United States, 375 F.2d 895 (9th Cir. 1967). Here, the finding of waiver by the trial judge is amply supported by evidence.

L. DENIAL OF SUPPRESSION OF BLOCK'S BANKRUPTCY TESTIMONY

Block personally was adjudicated a bankrupt on November 14, 1973. He testified at the first meeting of his creditors on December 11, 1973, which was continued on January 7, 1974, and June 24, 1974. On January 7, 1974, Block refused to answer certain questions on Fifth Amendment grounds. The district court held Block to be in contempt. To purge himself of contempt, he then answered the questions.

Prior to trial, Block moved for suppression of any evidence obtained by the government from the testimony given by him at those first meetings of his creditors. He based his motion on section 7(a) (10) of the Bankruptcy Act,

11 U.S.C. § 25(a)(1), which in pertinent part provides that the bankrupt shall:

> "* * * [A]t the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge * * *."[15]

This immunity cast on the government the heavy burden of affirmatively showing that the evidence it intended to present was derived from a legitimate source wholly independent from Block's bankruptcy testimony. Kastigar v. United States, 406 U.S.441, 461-62 (1972); Block v. Consino, 535 F.2d 1165, 1169

(9th Cir. 1976).

The trial court denied Block's motion to suppress, ruling that the government's affidavits and testimony met the burden. Prior to its ruling, the court offered to allow Block to call additional witnesses in support of his motion if he presented a written summary showing how his testimony before the SEC[16] differed from his bankruptcy testimony, and if he represented that those witnesses could give competent and relevant testimony. Otherwise, the court thought, there was nothing in the bankruptcy proceedings which was not covered before the SEC. Block's counsel said a comparison of the SEC and the bankruptcy testimonies would be attempted. However, nothing was done to comply with the court's suggestion, and Block did not raise the subject again.

Block now contends that the district court improperly put the burden upon him to prove that the government's evidence was tainted by use of his bankruptcy testimony. However, the record

shows that the court first required the government to prove by affidavits and testimony that no government attorneys or personnel connected with them in this case had seen, read, or used Block's bankruptcy testimony, directly or indirectly, before denying the motion to suppress.

We have reviewed the pertinent portions of the record in this appeal, and agree with the district court that the government met its burden under Kastigar. The court properly denied Block's motion to suppress.

M. PROPRIETY OF PROTECTIVE ORDER ISSUED IN BANKRUPTCY PROCEEDINGS.

While Block's bankruptcy was in progress during the pendency of this
11597 1 criminal case in the district court, Equity Funding was also undergoing Chapter X bankruptcy proceedings in the same district court. Block's bankruptcy was before Bankruptcy Judge Russell Seymour, and Equity Funding's bankruptcy was before Bankruptcy Judge James Moriarty.

Block obtained bankruptcy subpoenas

from Judge Seymour under Rule 205, Rules of Bankruptcy, to examine 61 witnesses. Block's acknowledged purpose in obtaining those subpoenas was to prepare for his criminal trial. Because two of those witnesses were located in Washington, D.C., Block initiated an ancillary proceeding in the bankruptcy court of that federal district pursuant to order of Judge Seymour, and subpoenas were issued there. Meanwhile, the trustee in reorganization for Equity Funding filed an application for a protective order to prevent the examination of the two District of Columbia witnesses, who had been lawyers for Equity Funding in connection with SEC matters. The trustee's reason (among others) was that examination of those witnesses would unduly disrupt the reorganization proceedings. On recommendation of Judge Moriarty, the district court issued the protective order enjoining the enforcement of the District of Columbia bankruptcy subpoenas.

Block contends that the protective order deprived him of his right to pre-

pare adequately for trial and his right to effective assistance of counsel. The district judge characterized this argument as frivolous.

Bankruptcy Rule 205(d) provides: "The examination under subdivisions (a) and (b) of the rule may relate only to the acts, conduct, or property of the bankrupt, or to any matter which may affect the administration of the bankrupt's estate, or to his right to discharge." The rule pertains to preparation for bankruptcy proceedings only - not to preparation for defense of a criminal action, which was Block's avowed purpose.

The protective order did not purport to limit any right Block had under Fed. R. Crim. P.15, 16, and 17 to use subpoenas, have discovery, and take depositions in connection with his criminal trial. We agree with the district judge that Block's contention is frivolous.

N. PROPRIETY OF CERTAIN COUNTS ON WHICH APPELLANTS WERE CONVICTED.

Lichtig contends that, as a matter of law, he could not have been convicted on Counts 6 and 10 through 14 because these six counts reallege by reference portions of Counts 1 and 2, which were dismissed before the case was submitted to the jury.[17] Block and Weiner adopt this argument as to the relevant counts on which each of them was convicted.

Count 1 charged Lichtig, Weiner, Block and nineteen others with conspiracy to commit securities fraud by mail, in violation of 18 U.S.C. § 371. Count 2 charged all twenty-two defendants with securities fraud in violation of 15 U.S.C. §§ 77q(a) and 77x. Count 2 incorporated by reference certain informational paragraphs of Count 1. The six counts each consisted of two paragraphs, the first of which incorporated by reference all the allegations of Count 2 (except the last paragraph of Count 2, which pertained only to defen-

dant Evans), and the second paragraph of which related a particular transaction wherein certain defendants, other than Lichtig, Weiner, and Block, used the mails. From these facts, Lichtig argues, reversal is required on the six counts because the first paragraph of each count merely realleges Counts 1 and 2, which no longer exist, and the second paragraph does not even refer to him.

Lichtig overlooks the following: (1) Fed. R. Crim. P. 7(c)(1), which provides, "Allegations made in one count may be incorporated by reference in another count"; (2) settled law that the dismissal of one count of an indictment which is referred to in the remaining counts where, as here, the reference is sufficiently full to incorporate the matter from the dismissed count (Crain v. United States, 162 U.S. 625, 653 (1896); United States v. Shavin, 287 F.2d 647, 650 (7th Cir. 1961); Barnard v. United States, 16 F.2d 451, 453 (9th Cir. 1926)); (3) settled law that one of several defendants may be charged with and convicted of a sub-

stantive offense when, as here, the evidence shows that he joined the conspiracy and that the substantive offense was committed in furtherance of the conspiracy, even if that defendant did not do and was not specifically aware of all the acts constituting the offense (Pinkerton v. United States, 328 U.S. 640 (1946); see also United States v. Janelli, 461 F.2d 483, 486 (2d Cir. 1972); United States v. Roselli, 432 F.2d 879, 894-95 (9th Cir. 1970)).

O. SUFFICIENCY OF THE EVIDENCE

Defendants contend that there was insufficient evidence to sustain their convictions. In our review we must take the evidence in "the light most favorable to the verdict." United States v. Nelson, 419 F.2d 1237, 1241 (9th Cir. 1969); Glasser v. United States, 315 U.S. at 80; United States v. Hood, 493 F.2d 677, 680 (9th Cir.), cert. denied, 419 U.S. 852 (1974).

Weiner was convicted of ten counts, Lichtig of thirteen, and Block of seven. Each defendant was sentenced to con-

current sentences on all counts. We need only find evidence sufficient to support conviction on one count for each defendant in order to sustain the verdicts under the concurrent-sentence doctrine. United States v. Valdovinos, 558 F.2d 531, 534 (9th Cir. 1977); United States v. Moore, 552 F.2d 860, 865 (9th Cir. 1977); United States v. Rodriguez, 546 F.2d 302, 308 (9th Cir. 1976). We will, however, consider more than one count as to each defendant, because of the nature and complexity of the case.

The counts under consideration may be divided into two groups. Counts 75, 78, 80, and 84 allege that one or more of the defendants "willfully made or caused to be made untrue statements of material fact" in various registration statements filed with the Securities and Exchange Commission. The allegedly false statements were that the firm of Wolfson, Weiner, Ratoff and Lapin[18] had audited the financial statements of Equity Funding and its subsidiaries
1599 using generally accepted auditing stan-

dards (GAAS) and had found them to be in conformity with generally accepted accounting principles (GAAP).[19]

The second group, Counts 76, 77, 79, 81, 82 and 83 charge Lichtig, and others not tried here, with willfully making and causing to be made untrue or false and misleading statements of material fact or willfully omitting or causing to be omitted statements of material fact about specific accounts contained in the financial statements included in the registration statements filed with the SEC. These counts deal with errors in the actual amounts reported.

These two groups of counts were treated together by the judge as the "false filing charges". In his instructions to the jury he stated the three necessary elements that the prosecution must establish in order to warrant a conviction:

> "The first element is that the defendant under consideration in the specific document named in the count made or caused to be made a false statement of material fact, or, where alleged

omitted or caused to be omitted a material fact required to be stated therein or necessary to make the statements therein not misleading.

"Counts 76, 77, 79 and 81 allege both false statements and omissions to make certain disclosures. The other counts allege only false statements.

"The second element is that the document named in each respective count has been filed with one or more of the bodies named in the count.

"The third element is that the defendant under consideration acted wilfully and, with respects to Counts 82, 83 and 84 that he additionally acted knowingly."

As previously stated, it is undisputed that the financial statements of Equity Funding failed to reflect the actual condition of the company. Thus, the first element is satisfied because the financial statements contained false statements of accounts. The connection of the defendants with the statements was shown by their individual responsibilities in relation to the audits. Each had a managerial role and had re-

sponsibilities for the overall audit and the final reports. Lichtig's connection, when he was an officer of Equity Funding, was shown by his signature on each registration statement as the Executive Vice President with financial responsibilities. The second element is also easily shown, as each document in question bears proof on its face of filing with the SEC.

The remaining inquiry is whether defendants approved of and concurred in the grossly misstated reports in the good faith belief that the statements were accurate representations or whether they knowingly and willfully acquiesced in the dissemination of false statements. See United States v. Colasurdo, 453 F.2d 585, 594 (2d Cir. 1971) cert. denied, 406 U.S. 917 (1972); United States v. Simon, 425 F.2d 796 (2d Cir. 1969), cert. denied, 397 U.S. 1006 (1970). In our discussion of intent in United States v. Kaplan, 554 F.2d 958 (9th Cir.), cert. denied, U.S. (1977), we stated:

11600

> "Credibility was for the jury. The jury had to resolve evidentiary conflicts and draw reasonable inferences therefrom. * * * An inference of criminal intent can be drawn from circumstantial evidence. * * *" 554 F.2d at 964. (Citations Omitted.)

As we discuss below, there was sufficient evidence from which the jury could find that defendants willfully and knowingly produced the documents containing erroneous information.

1. Sufficiency - An Overview

Each group of counts charged similar acts in different years. An erroneously recorded transaction in one year often persisted into the following years. Our count-by-count analysis is chronological, but in order to understand the full impact of particular actions a general examination is helpful.

Equity Funding's unorthodox bookkeeping began in the early 60's. Evidence of the manipulation before 1968 was presented to the jury. By 1968 a pattern had emerged in which the Funded

Loans and Accounts Receivable asset account (FLAR) was being used as an umbrella account for numerous and varying false entries. Other accounts, both assets and liabilities, were inflated or created as needed to present the desired picture of a healthy, growing corporation. Weiner and Lichtig had audited the company since the early sixties. After Lichtig became Equity Funding's Executive Vice President, Block became the audit manager. They were thus involved with the company's financial history almost from its inception. Weiner and Lichtig also helped engineer many of the "innovative" accounting techniques utilized over the years.

Various Equity Funding officials testified to the falsity of the figures that appeared on the financial statements and to the fact that in many instances no backup papers supported the entries. Therefore, if the auditors had attempted to confirm the information given to them they would have been unable to do so. The lack of backup

and supporting schedules would have been a clear indication that something was wrong. Since such backup often was not even fabricated, the jury could infer that the auditors either completely failed to audit the areas, in disregard of GAAS, or consciously failed to audit in "cooperation" with the Equity Funding officials, thus purposely avoiding the false entries. If the questionable areas had been audited and no backup found, the failure of the auditors to reflect that fact in their report would have clearly contravened GAAS and the purpose of an independent audit.

After the fraud was discovered in 1973, Touche, Ross & Co. was appointed to audit the financial statements of Equity Funding in accordance with GAAS and GAAP. Touche, Ross & Co. made substantial adjustments after finding it impossible to confirm properly many of the recorded transactions or upon finding that mathematical calculations were erroneous. Many of the adjustments related to transactions that occurred years before. The total final adjust-

ment to the FLAR account alone was a deduction of $62,305,353 to eliminate the items related to false or improper entries. The remaining valid balance was approximately $44,000,000. 11601

The testimony of William Simpson, an SEC accountant, further supported the Findings of the auditors from Touche, Ross & Co., as did the testimony of the Equity Funding employees regarding the development of nonexistent assets. The sheer magnitude of the adjustment, and the length of time over which Weiner, Lichtig, and Block were involved with the company, warrants at first consideration a strong inference that the defendant auditors either were totally inept or, more likely, were at least partly aware of the false inflation of Equity Funding's accounts. Our discussion of the FLAR and other accounts in the financial statement for 1968 through 1971 will detail the particular treatment of several items later found to be false.

2. The Audits

a. 1968

At the beginning of the 1968 audit, Jerome Evans, Treasurer of Equity Funding, disappeared. The company's books also vanished. John Templeton was appointed controller and, with the cooperation of Equity Funding employees and the auditors, attempted a reconstruction of the books. Starting from the unaudited third-quarter statement, they developed a yearly statement. The FLAR account showed a balance of $36,311,037. The opposite liabilities account, Notes Payable and Funded Loans and Accounts Receivable, totaled $15,564,629.29. The Consolidated Statement of Financial Condition that appeared in registration statements filed with the SEC on April 22, 1969, and December 31, 1969, contained these figures.

Count 75 of the indictment alleges that defendants Weiner and Lichtig "willfully made and caused to be made untrue statements of material fact" in

the April registration statement. The untrue statements were in the Accountant's Report submitted to the SEC with the registration statement. The untrue facts and omissions were the erroneous reporting of various specific accounts contained in the financial statement and incomplete descriptions of certain accounts.

There is no question about the inaccuracy of the figures contained in the financial statements. The necessary determination is whether there was sufficient evidenct to support the jury's verdict and the underlying finding that defendants had acted willfully and with knowledge in filing the incorrect financial data and certifying its reliability.

The FLAR and Notes Payable Accounts contain references to footnote 4 in the Notes to the Consolidated Financial Statement[20], which states:

> "Under the method of operations of the company, this represents, in the aggregate, the amount that clients owe as a

result of the various 'funding programs' offered by the company, together with loans and/or receivables where 'funding programs' have terminated and where the respective shares have not been liquidated as of December 31, 1968.

"The Funded Loans and Accounts Receivable are offset, in part, by the Contra Notes Payable in Funded Loans and Accounts Receivable. The difference, in the amount of $20,746,408 is held by Equity Funding Corporation of America or one of its subsidiaries."

1/402

Contrary to the footnote, the FLAR was not composed only of sums related to the funding programs. Templeton had been unable to support the estimated figure for the FLAR with detail from funding programs in his original work and had been told that the discrepancy was due to the fact that $13,500,000 included in the account represented reciprocal commissions (recip).[21] The SEC had previously ruled that brokers were forbidden to pay such commissions. There was, however, no constraint on Equity Funding's right to receive such money.

At Templeton's insistence, Weiner and Lichtig were informed of the inclusion of "recip" in the FLAR account. They were told it was necessary to place the item in the account because problems could arise if there were an open reporting of the funds. Lichtig and Weiner agreed to the inclusion of the amount without any confirmation.

The inclusion of the "recip" in the FLAR account was misleading. The footnote for the account contains no indication that it represents any money other than that related to the various funding programs. There is a material difference in representing that the $13,500,000 was a receivable resulting from the sale of the product the company offered rather than a one-time collection of monies due.

A second error in the FLAR balance demonstrated that the independent auditors failed properly to check the company's financial statements. Templeton testified that he had determined that the "collateral held by EFCA" on

funded loans that had terminated was worth $6,672,337. He arrived at the figure by looking at approximately 390 funding programs and finding that seven for which Equity Funding still held the collateral had terminated. He computed this as a termination rate of 18 percent, and multiplied that figure by the estimated total collateral held by Equity Funding to reach the $6 million figure. In fact, the percentage was properly 1.8 percent, and the figure should have been only $667,233.70 William Simpson testified that the workpapers contained a notation next to the inflated figure: "To be revised." In parentheses on another sheet, the lower percentage had been used to arrive at the correct, lower figure. The revision was never included in the final trial balance or the completed financial statements.

Other evidence tending to show the lack of application of GAAS and GAAP included the fact that the footnote showed no figure for the total amount of collateral supposedly held by Equity

Funding for the funded loans. Auditors examining the records after discovery of the fraud found confirmation of the internally held programs of their collateral. Other mathematical duplications in various accounts went uncorrected. Detail work for the portion of the FLAR arising out of the actual programs was not fully confirmed.

Thus, in 1968 the FLAR was riddled with mathematical errors, incorrectly described in the relevant footnote, and contained items that were not and often could not be confirmed. Weiner was the managing partner for the audit, and Lichtig was the field manager. Templeton testified that Lichtig had informed him that the inclusion of 11603
"recip" in the FLAR account was acceptable, and there would be no confirmation. Lichtig was in constant contact with Templeton and was aware of Templeton's frequent questions about various procedures. He was also responsible for reviewing the workpapers of the auditors working below him. Templeton testified that Lichtig told him he

would not confirm the accounts receivable, and that Lichtig refused to permit Templeton to see the audit workpapers from previous years to aid in the reconstruction of the records. Finally, Lichtig was responsible for the note describing the FLAR and Contra Notes Payable accounts.

There was clearly sufficient evidence to support the jury's conviction of Lichtig on Count 75. Since Count 76 dealt with a registration statement containing the same financial statement, that conviction was also supported by the evidence. Lichtig had become an officer of Equity Funding by the time of the filing of the second statement, and his signature appears at the end of the statement in his official capacity. As an auditor he had known about the falsehoods in the financial statement, and as an officer of the corporation he continued to misrepresent the fact that the statement did not accurately reflect Equity Funding's financial status.

The evidence as to Weiner is not as

clear as to Count 75. The major relevant testimony is Templeton's description of Lichtig's representations regarding "recip" after the meeting with Weiner and Goldblum. Were this the only evidence and the only count against Weiner, his conviction might be difficult to sustain. In light of the testimony regarding his participation in later years, his position of responsibility, and the enormity of the misstatements, however, it was possible for the jury to infer his knowing and willful participation in the preparation of the false statements. In any event, we need not consider the question further because there is ample evidence to sustain his conviction under other counts.

b. 1969

Counts 77 and 82 repeat the basic allegation contained in Count 76, and Count 78 repeats the basic allegation contained in Count 75. Counts 77 and 82 relate to a registration statement filed with the SEC on December 9, 1970;

Count 78 relates to one filed on August 20, 1970. Lichtig is charged in Counts 77 and 82 with making or causing to be made untrue statements about accounts listed in the financial statements contained in the registration statements, and Weiner and Block are charged with making or causing to be made untrue statements or omitting material facts in the accountants' report in Count 78. Weiner and Lichtig were convicted on these counts; Block was not.

Each registration statement contained an audited Consolidated Statement of Financial Condition as of December 31, 1969. The "Report of Independent Certified Public Accounts" signed by Wolfson, Weiner, Ratoff and Lapin, and included with the financial statements, represents that an independent audit had been made, that the examination was "made in accordance with generally accepted auditing standards", and that the financial statement was in conformity with GAAP.

The FLAR account is recorded at

$51,188,199, up almost $15 million from the year before. Contra Notes Payable equaled $21,703,967, and Note 4, the referenced footnote, states that the difference of $29,484,151 is held by Equity⊥Funding and its subsidiaries. 11604
The note essentially duplicates that written for the 1968 statement, except for the figures and the insertion of the words "and net contracts receivable" in the first paragraph.[22]

Sultan testified that the first trial balance during the audit for 1969 had a FLAR balance of $33 million, which was too low. After discussions with others in the company it was decided that other assets would be added to the FLAR account and the detail would be padded on the basic funded loans asset.

The Investors Planning acquisition previously discussed took place in 1969, and the creation of the Client Contractual Receivable Account significantly increased the FLAR balance. The final amount booked in the Clients Contractual Receivable Account in which the

Investors Planning manipulations were reflected was $17,847,290, with commissions payable of $4,638,473, for a total of around $13 million in income recorded. According to West, the CPA from Wolfson, Weiner, Ratoff and Lapin who worked on the audits from 1969 through 1972, a final adjustment of $1,500,000 was made in the account after Block indicated that the company needed more income.

Norman Grossman, a partner in Touche, Ross & Co., testified that the accounting treatment of the trail commissions was contrary to GAAP. Normally, when a company makes an acquisition the assigned value cannot exceed the purchase price. The purchase price here was $10 million, but an additional $17 million value was assigned to the trail commissions. The value of the $10 million acquisition was thus inflated in the financial statement to approximately $27,8000,000. It was also contrary to GAAP to accrue these commissions in the year of purchase and to record excess value.[23]

Once the establishment of the Clients Contractual Account had been agreed to, Goldblum promised to write a letter to Weiner guaranteeing the purchase of the commissions should the planned sale not go through. Block then wrote a footnote to the financial statement accurately describing the transaction. Lowell testified that he, Weiner, and Goldblum found the footnote totally unacceptable. With Weiner's participation, they compromised on inserting the phrase "and net contracts receivable." It was inserted in the middle of an unrelated sequence in order to avoid arousing interest. According to Lowell, Weiner was aware that if Block's footnote had been used the company would have shown a <u>decrease</u> in earnings, while the use of the compromise footnote and the addition of the Clients Contractual Receivable to the FLAR account created an increase.

A deliberate arithmetical error was introduced to the final detail information on the funded loans asset to increase its paper value. Lowell met

with Weiner and told him that if he
11405 did not have the detail added up, the company could take care of the shortfall. This was done by inserting a $2 million "plug", which appeared in the total but not in the detail lists. Lowell showed the computer card containing the "plug" to Lichtig. Lloyd Edens former director of financial services of Equity Funding and Treasurer of Equity Funding Life, in his testimony, confirmed the use of the device.

Fred Levin, Executive Vice President of Equity Funding and President of the life insurance subsidiary, Equity Funding Life Insurance Company (Equity Funding Life), confirmed that meetings had taken place between Weiner and Lowell regarding the treatment of the Investors Planning commissions. West testified that he and other coworkers on the audit had questioned Block about the recording of the Client Contractual Account on the 1969 audit because they felt it was an unorthodox treatment. Block told them he would discuss it with Weiner, and later said that on

Weiner's direction it would be allowed to stand.

There was ample evidence to show Weiner's knowledge of the improper handling of the FLAR account. The modified footnote that he helped draft concealed the true condition and operations of the company. According to Lowell, Weiner was aware of the misleading effect of the presentation used. In addition, Grosman and others testified about the failure to adhere to GAAP and GAAS. This evidence, and evidence of failures to confirm major assets claimed or to check the information supplied by the company, supports the jury's finding that Weiner knowingly and willfully made or caused to be made false and misleading statements in the auditor's report. Weiner's position as managing partner and his active participation in developing ways of presenting only advantageous descriptions of the company's financial condition also support his conviction on Count 78.

Lichtig's involvement was shown in

a number of ways. He was originally in charge of presenting the figures to the auditors in the beginning of 1969.[24] He was a participant in meetings with Goldblum, Weiner, and Lowell where the accounting treatment of the trail commissions was determined. He was shown the card with the "plug". His signature appears on the SEC statement as Executive Vice President and Treasurer. He knew of the inflation in the FLAR account from previous years. This and other evidence demonstrated his general knowledge of the purposeful false inflation of FLAR and other accounts on the financial statement. The jury had sufficient evidence to convict him on Counts 77 and 82.

c. 1970 and 1971

Count 79 charges Lichtig with acts similar to those charged in Count 76 with regard to a registration statement filed with the SEC on December 7, 1971. Count 80 charges Weiner and Block with the same violation as charged in Count 75 with regard to the 1971 registration

statement, which contained the audited statements for 1970. All three defendants were convicted.

In 1970, the Investors Planning trail commission sale was made. There was no confirmation of the sale in the workpapers, and West testified he saw no attempts to verify the collectibility of the balance of the receivable after the initial down payment by checking on the purchaser's financial condition. 11666 There was testimony that this was contrary to GAAS. Other significant events in 1970 included the discovery of a $10 million plug in the total for the Funded Loans Receivable asset. Edens testified that he had helped manufacture the plug by running a special total sheet that was given to the auditors. The plug was found when West added a few sample pages of the detail, multiplied it by the total number of pages, and found the result greatly inadequate. Lichtig alerted Lowell to the problem, and a meeting was held among Lowell, Lichtig, Edens, and another Equity Funding employee, Bill Mercudo. Edens was

directed to prepare a reconciliation, which he then gave to Block. Edens testified that he manufactured backup for the information given to Block, and that a check of the schedules supplied would have revealed the falsity of the claimed assets.

The general ledger contained many entries that showed simultaneous increases and transfers in round numbers in accounts that normally are unrelated. Grosman, Benjamin Karchin, an SEC examiner, and West all confirmed the impropriety of the entries. Block never questioned the methodology underlying the entries, and there was no evidence found in the workpapers that any checks on the various transfers and inflations had taken place. Sultan testified that the entries were purely fictitious and no backup or schedules supporting them had been prepared.

Block was also specifically aware of the reclassification of Selling, General and Administrative costs into Commission expenses. The two accounts were un-

related, so the reclassification was suspicious on its face. Block did not follow up on the reclassification to determine the justification for it. The change was in fact an improper manipulation of the accounts. Block also never questioned the inclusion of exploration costs on the books of Equity Funding. Such costs normally would be reflected on the books of the company actually doing the exploration, i.e., the appropriate subsidiary, rather than on the books of the parent corporation.

Lowell testified that in 1971, during the course of the 1970 audit, Block told him that he knew about "recip".[25] The statement came up during a conversation about notes receivable. The notes did not exist as a true receivable, but supposedly represented a collection of "recip" that Equity Funding did not want to reveal. Block asked for confirmation, and a confirmation was arranged through someone in Italy. Weiner directed Lowell to get confirmation for Block, despite Lowell's protests. This was only one of several

times that Lowell had confirmations manufactured at Weiner's request. Block indicated knowledge of the questionable nature of some of these false confirmations when he pointed out to Lowell that envelopes bearing the confirmations had unlikely postmarks.

Lowell testified that Block had questioned some of the procedures during the first part of the audit. Lowell with concurrence of other participants in the scheme, offered Block a trip to Rome if he would cooperate. After this conversation, the reconciliation to explain the $10 million gap in the funded loans asset was given to Block, and he
11607 was told to handle it himself. No further questions were raised by him about the asset, and, as stated, apparently no inquiry into backup was made. Block's suspicions were aroused in 1969. The jury chose not to convict him for his activities then. Their finding that by 1971, during the audit for 1970, Block had the requisite willfulness and knowledge is supported by the record. Although he may not have known the mag-

nitude of the fraud or many of its details, his awareness of the manipulations used and his willingness to cooperate and not fully investigate suspicious areas suffice to sustain his conviction on Count 80.

During the 1970 audit Weiner knew that two confirmations, one for an account at Banco Union and another for Banque Jordan, were prepared at Lowell's direction. Weiner received one by mail and one from Lowell personally. At the least, he knew that the explanation for the accounts was that they concealed "recip" income, and he nonetheless cooperated in falsifying the confirmations. The confirmations showed the accounts to be cash deposits subject to withdrawal by check with no interest shown as payable. This was never questioned even though the accounts were listed as investment accounts in the financial statements. Weiner also knew that certain notes receivable were not what they purported to be. During the 1970 audit he participated in developing a cover-up of a mistake made in the 1969 record-

ing of an investment. The account was reclassified with Weiner's knowledge, and a note was attached to the journal entries dealing with the reclassification which stated: "all transactions verified by JW - WWR & L -- no adjustments necessary." Lowell prepared the schedule and note and sent a copy to Weiner and Block. Weiner's continuing involvement with various misleading practices was sufficiently proved to sustain his conviction on Count 80.

Lichtig participated in the discussions of how to cover up the $10 million plug discovered by West. His continued role as an officer of Equity Funding involved in its financial affairs, combined with his previous knowledge of the falsification in the account, supplied sufficient evidence to sustain his conviction on Count 79.

Counts 81 and 93, charging Lichtig, and 84, charging Block and Weiner, are the same counts for the 1971 audit based on SEC registration statements filed on September 8,1972, and April 5, 1972,

which contained audited financial statements for the year 1971. The involvement of each defendant was continuing. They each held the same position as in the years before. Block's further knowledge of the falsity of the financial statements was demonstrated by events such as a conversation with Lowell in the summer of 1971 wherein he described, hypothetically, a transaction exactly like that which had been set up for the purported sale of the Investors Planning Client Contractual receivable. He also made requests to Lowell and Goldblum for a job with Equity Funding, thus bringing his independence sharply into question. Sultan testified that the earnings-per-share figure released in a press release turned out to be a penny off, and that he had discussed the problem with Block. Sultan changed the figures showing the number of outstanding shares, and Block was aware that the change to an erroneous figure was made.

In general, inflations of accounts continued in 1971, and earlier incorrect

figures were carried froward even though in some instances there was a prima facie indication that something was
1/6c8 wrong with the accounts. In one instance an account that would not normally have been static had the same beginning and ending balance, and there was no investigation to determine the reason for such an unusual situation. Also, no payment was received on various notes receivable; yet the notes were not discounted or written off but were carried at full value. Thus, sufficient evidence existed to support defendants' convictions on each of the applicable counts for the audits for the years 1970 and 1971.

In view of the sufficiency of the evidence on the foregoing counts, the concurrent sentence doctrine makes it unnecessary to review in detail the evidence on Counts 6 and 10 through 14.

Summation.

Defendants have contended that they were victims of the fraud perpetrated by the officers of Equity Funding, and

that, although they might have been to some degree negligent or they might have erred in their judgment as auditors, their criminal participation was not proved. More accurate is the following comment of the trial judge made during the proceedings relating to defendant's motion for new trial:

> "The evidence, I think, does not show that the defendants were aware of the fraud in its early stages. I think they were the victims of the fraud for some period of time. * * * Even though the evidence is not altogether direct, it is largely circumstantial, it is overwhelming to the point where I cannot escape the conclusion that the defendants must have known and must have come to a point where they knew of the fraud, and that they thereafter did acts in furtherance of the fraud."

The Equity Funding account was a large part of the business of Wolfson, Weiner, Ratoff and Lapin. Weiner and Block had worked with Equity Funding almost from its inception. Weiner's participation in financial decision-making at critical stages was establish-

ed. Lichtig moved into an executive position. By 1971, Block was also attempting to gain employment with Equity Funding. There is no question that a purposeful fraud was perpetrated by the officers of Equity Funding. The overwhelming scope of the fraud, its often complex but sometimes very simple mechanisms, and the failure of the auditors to find in any of the suspicious procedures cause to dig further into Equity Funding's financial records system all lead to the inescapable conclusion that defendants were involved. Even if they did not initially know or indeed learn the step-by-step fictitious entries and improper manipulations, their consistent failure to apply GAAS and GAAP after they knew some kind of a major fraud was afoot provided a basis from which the jury could reasonably infer defendants' knowing and willful participation in the fraud.

> "* * *Generally accepted accounting principles instruct an accountant what to do in the usual case where he has no reason to doubt that the affairs of the

corporation are being honestly conducted. Once he has reason to believe that this basic assumption is false, an entirely different situation confronts him.* * *." United States v. Simon, 425 F.2d at 806.

P. JURY INSTRUCTIONS DEALING WITH INTENT

We next dispose of defendants' contentions regarding certain jury instructions: those related to the question of the sufficiency of the evidence.

1609

a. Compliance with GAAS and GAAP

Defendants first challenge the court's instruction on the rule of generally accepted auditing standards and generally accepted accounting principles in the jury's deliberations. The instruction is reproduced in the margin.[26]

We have not previously ruled on the propriety of instructions which state that compliance or noncompliance with GAAS or GAAP is relevant to the determination of a defendant's intent. The Second Circuit has dealt with similar instructions in United States v. Simon,

25 F.2d 796 (2d Cir. 1969), and United States v. Natelli, 527 F.2d 311, 318-24 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976). In Simon three accountants appealed from their convictions on three counts arising out of their drawing up and certifying a misleading and false financial statement. The jury was instructed that the primary determination was whether the financial statements accurately reflected the company's condition, and, if not, whether the defendants acted in good faith. Proof of complaince with GAAS was deemed "evidence which may be very persuasive but not necessarily conclusive that he acted in good faith." 425 F.2d at 805 See United States v. Natelli, 527 F.2d at 318-24; United States v. Colasurdo, 453 F.2d at 594.

The prosecution introduced into evidence the Statement on Auditing Standards (1973) issued by the Committee on Auditing Procedure, American Institute of Certified Public Accountants. The Statement outlines the general purpose of the independent audit,[27] and

⊥§ 110.05 explains the responsibilities of the individual auditor who finds fraud in the entity whose records are being examined: ⊥1610

> "In making the ordinary examination, the independent auditor is aware of the possibility that fraud may exist * * *. However, the ordinary examination directed to the expression of an opinion on financial statements is not primarily or specifically designed and cannot be relied upon, to disclose defalcation and other similar irregularities, although their discovery may result * * *. The responsibility of the independent auditor for failure to detect fraud (which responsibility differs as to clients and others) arises only when such failure clearly results from failure to comply with generally accepted auditing standards."

Under these standards the auditor is not "responsible" for fraud that has gone undetected despite his utilization of generally accepted auditing standards. In our case, failure to apply generally accepted auditing standards is relevant to the issue of knowledge and willful-

ness.

Sufficient evidence was introduced to raise the issue of conformity with GAAS and GAAP. During the trial several witnesses testified that many of the practices under consideration were not in conformance with GAAS and GAAP. Generally, no audit manual was prepared for each year's audit, no checks on internal controls were made, and basic standards for confirming accounts were not followed. The witnesses included Norman Grosman, a partner in Touche, Ross & Co.; Frank West, who worked on the audits from 1969 through 1972; and William Simpson and Benjamin Karchin, SEC employees who reviewed Equity Funding's books. The jury had evidence from which it could determine whether GAAS and GAAP were properly utilized and whether the failure to utilize them was such as to lead to a reasonable inference of criminal intent.

The judge's instruction, which stated that evidence regarding compliance with GAAS and GAAP was not con-

clusive but was relevant, was a proper statement. The weight to be given the evidence was for the jury's determination.

b. "Willfulness"

Defendants also assert that the court erred in instructing the jury on the issue of knowledge. The jury was instructed that proof of negligence was insufficient to support a conviction, and that proof of good faith constituted a complete defense to the charges. The court went on to instruct the jury that, in determining intent, the jury could consider whether defendants acted in "reckless, deliberate indifference to or disregard for truth or falsity" and could infer from proof of such acts that defendants acted willfully and knowingly.[28]

[28] The instruction was given before our decision in United States v. Jewell, 532 F.2d 697 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976), where we held:

"* * * To act 'knowingly,'

> therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, "positive" knowledge is not required." 532 F.2d at 700

United States v. Valle-Valdez, 554 F.2d 911, 913-14 (9th Cir. 1977). The trial court's instruction in the present case followed closely the instruction approved by the Second Circuit in United States v. Natelli, 527 F.2d at 322-23. There the trial court had instructed the jury that, on proof of "reckless deliberate indifference to or disregard for truth or falsity," the jury could infer the defendants' willful and knowing participation in the filing of false financial information with the SEC. The defendants contended that the instruction erroneously failed to state also that there must be a concurrent, "conscious purpose to avoid learning the truth." 527 F.2d at 323. The court approved the instruction and stated:

> "* * *The dual instruction is not necessarily required, however, when the defendant is under a specific duty to discover the true facts, the facts tendered are suspect, and he does nothing to correct them." 527 F.2d at 323

The court properly instructed the jury on the need to find both deliberate avoidance and an awareness of impropriety. Defendants here, as auditors, had a duty carefully to investigate and review the information presented. Because the instruction stated that good faith constituted a complete defense, it was implicit in the instruction that, coupled with a finding of deliberate avoidance of knowledge, the jury also had to find bad faith.

As the Second Circuit stated in United States v. Simon:

> "* * * 'While there is no allowable inference of knowledge from the mere fact of falsity, there are many cases where from the actor's special situation and continuity of conduct an inference that he did know the untruth of what he said or wrote may legitimately be drawn.'* * * Evidence that defendants knowingly

11612

> suppressed one fact permitted, although it surely did not compel, an inference that their suppression of another was likewise knowing and willful." 425 F.2d at 809, quoting from Bentel v. United States, 13 F.2d 327, 329 (2d Cir.), cert. denied, 273 U.S. 713 (1926.

In view of the defendants' duty because of their roles as auditors and financial officer of the company, the jury instruction was proper.

Q. JURY INSTRUCTIONS ON UNANIMITY

Lichtig, joined by Block and Weiner, contends that the court failed to instruct the jury properly on the unanimity requirements for a finding of guilt on Count 6 and Counts 10 through 14.[29] These counts charged mail-fraud violations, and incorporated Count 2 and a portion of Count 1 which detailed specific wrongful acts. Lichtig argues that Counts 1 and 2 alleged acts occurring both while he was an auditor and while he was an executive of Equity Funding, that two distinct time periods were thus established, and that the jury

should have been instructed that is had to be unanimous as to at least one time period.[30] Appellants also argue that there was a failure to instruct on the need for unanimity as to individual "acts or specifications" in a single count.

A reading of the jury instructions shows that the court separated out the six mail-fraud counts and instructed the jury that it had to find three elements in order to convict. The first two elements were the participation of the particular defendant in the offering or sale of securities where use was made of some manner of transportation in interstate commerce or of the mails. The third element contained three alternative subparts. As to this element the jury was instructed it also had to find that the defendant (1) willfully and knowingly employed any device, scheme, or artifice to defraud, or (2) willfully obtained money or property by utilizing untrue statements of material fact or by omitting statements of material fact which were necessary to

make the statement accurate, or (3) willfully and knowingly engaged in a transaction, practice, or course of business which operated as a fraud or deceit upon a purchaser. Immediately following this instruction, the court continued:

> "Although it is necessary to prove only one of the three different subparts I have just mentioned, if you find one or more of such subparts has been proved, you must agree unanimously upon at least one of such subparts before you can convict for such offense."

The instruction outlined the elements, and, for the one portion where alternate findings were possible, clearly emphasized the necessity of unanimity. Unlike United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 394 (1976); Street v. New York, 394 U.S. 547 (1969); and Yates v. United States, 354 U.S. 298 (1957), the jury here was properly instructed on unanimity and the various alternate bases were supported by the evidence. (See discussion on sufficiency of the evidence, Part O, supra.)

As to the necessity of instructing the jury that it had to agree unanimously in its verdicts on the individual acts specified in a given charge:

> "* * *[T]he defendants confuse the scheme to defraud, which is the gist of the offense, with the means adopted to effectuate that scheme.* * *" Simons v. United States, 119 F.2d 539, 549 (9th Cir.), cert. denied, 314 U.S. 616 (1941).

See United States v. Amrep Corp., 560 F.2d 539 (2d Cir. 1977). The charges against the defendants involved schemes to defraud, and the particular acts alleged were the means for carrying the general schemes into effect. The court sufficiently instructed the jury on the need for unanimity.

R. FAILURE TO HAVE CERTAIN PROCEEDINGS RECORDED

Defendants contend that the trial court erred in failing to have three portions of the trial reported pursuant to the mandate of the Court Reporter Act, 28 U.S.C. § 753(b), that "all proceedings in criminal cases had in

open court" be recorded verbatim. The proceedings that went unreported were: (1) the judge's action in ascertaining that the presence of two jurors on an elevator during a conversation between a government attorney and witness was harmless; (2) part of the discussion regarding the proposed jury instructions; and (3) a portion of the jury voir dire.

The first event has been dealt with in our discussion of alleged prejudicial communications, Part C, supra, where we find no significant basis for overruling the trial court. We further note that no explicit request for a court reporter was made by defendants at the time of the incident. See United States v. Piascik, 559 F.2d 545, 550 (9th Cir. 1977), cert. denied, U.S. (1978). There was no error in the court's handling of the situation.

As to the second incident, at the commencement of the discussion on the jury instructions the court stated, "It seems to me that we should let the

reporter go, because I don't plan on making any rulings." No objection was made and the reporter was dismissed. Thereafter, Markowitz, attorney for Block, requested the presence of the reporter. A discussion on the record ensued and the judge informed counsel that he was willing to keep the reporter there, but that the "free discussion" they had been having would have to cease and each attorney would have to speak from the podium. The court assured counsel that they would be given an opportunity to make timely objections on the record. Markowitz agreed that if the making of a timely objection was shown on the record, there was no need for the reporter. The reporter was again excused. No objection was made by any counsel.

Defendants now contend that they are prejudiced because all of their arguments regarding the instructions are not available for review. As promised by the judge, their objections were reported in detail after a deter-

mination had been made as to what instructions were to be given. Defendants point to no objection that went unreported; they point only to unreported arguments in support of their objections. The objections were adequately preserved for our review, and no counsel has been bound merely to restating the arguments made below; they have in fact expanded on their arguments on appeal. Trial courts frequently discuss instructions in chambers before a record is made.

In addition, although this court has held that compliance with 28 U.S.C. § 753(b) is mandatory, we have also held that a waiver without personal consent of the defendant is permissible. United States v. Piascik, 559 F.2d at 549-50. Counsel here withdrew the objection to the reporter's absence and cannot now reassert it.

The last disputed incident involved the trial court's preliminary "administrative" voir dire of the prospective jurors. Before the case was formally

called, the judge informed the array of jurors that those who wished to be excused should approach the bench individually, and he would then rule on the sufficiency of each excuse presented. See 28 U.S.C. § 1866(c). The individual excuses were not reported. When the case was called, defendants objected to the array and requested a new array in its stead. The objection was overruled, and regular voir dire was conducted.

Although we believe that the better procedure is to report everything said in the courtroom, a reversal is not necessary. Defendants allege no prejudice. The court's administrative transactions with jurors who had personal excuses preceded the calling of the case and the formal commencement of the proceedings. The preliminary screening of the array here, prior to the calling of the case for trial, presents no different situation than if the jurors had telephoned or written their requests. If something prejudicial to the case occurred, counsel

could be depended upon to tell us what it was. There has been no hint of any irregularity. In United States v. Piascik, decided after the trial in this case, we stated:

> "* * *In the exercise of our supervisory powers, we suggest that court reporters be required to record (but not transcribe unless requested for appellate purposes) the voir dire examination of jurors* * * when requested by the court or counsel. * * *" 559 F.2d at 550 (Emphasis added).

S. CONCLUSION

While it was not necessary to notice and discuss every point made by the appellants in their lengthy briefs, we have considered them all. Lichtig makes several other charges of improper tactics by government counsel which, when examined in the context of the trial, evaporate into harmless error, if indeed there was error at all. We do notice, however, Lichtig's point about the alleged failure of the government to comply with 18 U.S.C. §3504. This section requires the government in

certain situations to admit or deny certain types of surveillance. The standards for such disclaimers are adequately covered in United States v. See, 505 F.2d 845, 856 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975); United States v. Vielguth, 502 F.2d 1257, 1260 (9th Cir. 1974); United States v. Alter, 482 F.2d 1016, 1027 (9th Cir. 1973). We are satisfied, as was the trial court, that the affidavits of the prosecutor sufficiently answered all of Lichtig's checklist assertions of improper surveillance. The charges of misconduct leveled against
1 the prosecutor, not unlike some of the 1615
other assignments of error, have been magnified in the hope that some pellet from the shotgun might fall upon a vulnerable spot. It is to the considerable credit of the judge who tried this complex case that the record is not only free from reversible error, but is remarkably clean in terms of the minor imperfections that creep into a long and involved trial.

Affirmed.

FOOTNOTES:

[1]In "equity funding" or "life funding" programs, a participant purchases mutual funds for cash; at the same time, the participant purchases life insurance with funds borrowed from the company by pledging the mutual funds as security.

---

[2]In United States v. Lustig, 555 F.2d 751 (9th Cir. 1977), we said: "Lustig would have a valid objection if one or more jury members expressed some uncertainty as to the verdict." But we were speaking of the expression of the uncertainty at the time of the poll, not after the jurors had been excused and subjected to out-of-court cultivation.

---

[3]Allen v. United States, 164 U.S. 492 (1896).

---

[4]We have recently held that giving the instruction a second time is erroneous per se, United States v. Seawell, 550 F.2d 1159 (9th Cir. 1977).

---

[5]"Reciptocal income" was a term used to describe a practice by brokers, until it was discontinued, of sharing commissions on market transactions with the insurance producers.

---

[6]The trial took place prior to the effective date of Pub.L. 93-595, § 1, 88 Stat. 1932 (1975), which created the codified Federal Rules of Evidence. Prior law is therefore applicable.

---

[7]Cf. United States v. Dunn, 564 F.2d 348, 357 (9th Cir. 1977) (discussing the slight evidence rule in the context of sufficiency of the evidence).

---

[8] Investors Planning sold contractual plans for the purchase of mutual funds. These plans did not involve an actual contractual agreement, but

merely denoted programs where commissions on the sale of mutual funds were collected in such a manner that up to 50 percent of the commissions were collected in the first year and the balance of the commissions were spread out over the remainder of the period of acquisitions, an average of 12-1/2 years. The actual amount of commissions collected on a completed program was approximately equivalent to that collected under other kinds of payment plans. Purchasers of mutual funds were under no obligation to complete the plan and could withdraw at any time, thus relieving themselves of any future commission obligation as well.

---

[9] Trail commissions represent commissions not yet collected but expected as future sales under the programs are made.

---

[10] Detail is the term for the individual components of an account.

---

[11] Coconspirator hearsay admissibility does not depend upon the declarant's unavailability. 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶¶ 800 [04], 804(a) [01]; Fed. R. Evid. 804.

---

[12] The defendants' contention that the government was obliged to grant immunity to Goldblum so that he might testify on their behalf is also meritless. The Sixth Amendment contains no such requirement. United States v. Bautista, 509 F.2d 675, 677 (9th Cir.), cert. denied, 421 U.S. 976 (1975).

---

[13] United States v. Baxter, 492 F.2d 150, 177 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974).

---

[14] See also Mancusi v. Stubbs, 408 U.S. 204, 213 (1972), where the Court reemphasizes the significance of the reliability of the offered evidence.

---

[15] This statutory grant of "use plus derivative use" immunity is co-extensive with the Fifth Amendment privilege against self-incrimination. Kastigar v. United States, 406 U.S. 441 462 (1971). See Goldberg v. Weiner, 480 F.2d 1067, 1070 (9th Cir. 1972).

---

[16] In Part K we discuss an aspect of the proceeding before the SEC. Block testified before the SEC on May 21, 22, and 30, 1973, and on September 24, 1973. He first testified in his bankruptcy case on December 11, 1973.

---

[17] The trial judge was careful to summarize the charges in the six counts for the jury, including the portions of Counts 1 and 2 which were incorporated by reference, and to admonish the jury to consider only the counts submitted to it and not the counts which had been dismissed.

---

[18] The accounting firm of which all three defendants were a part was originally called Wolfson and Weiner. It expanded to Wolfson, Weiner, Ratoff and Lapin, and then merged with Seidman and Seidman in 1971.

---

[19] The relevant portion of the text which appears in each of these counts is as follows:

> "* * * [T]he firm of Wolfson, Weiner, Ratoff and Lapin (Seidman and Seidman), certified public accountants, had examined the consolidated statements of financial condition of EFCA and its subsidiaries as of December 31, 1968 (1969-1971), and the related consolidated statements of earnings and retained earnings and the consolidated statements of additional paid-in capital for the five years then ended, in accordance with generally accepted auditing standards, and that, in the opinion of Wolfson, Weiner, Ratoff and Lapin (Seidman and Seidman), the aforesaid financial statements presented fairly the consolidated financial position of EFCA and its subsidiaries as of December 31, 1968 (1969-1971), and the consolidated results of operations

for the five years then ended, in conformity with generally accepted accounting principles applied on a consistent basis."

---

[20] The proper footnote is footnote 3.

---

[21] "Reciprocal commissions' is the term used for the portion of commissions earned by various brokerage houses on securities transactions involving Equity Funding that was returned to Equity Funding.

---

[22] The revised portion of the note, with the addition underlined, reads:

> "Under the Company's method of operations, this represents, in the aggregate, the amount that clients owe as a result of the various "Equity Funding Programs' offered by the Company, and net contracts receivable together with loan and/or receivables where 'Equity Funding Programs' have terminated."

---

[23] Referring to our earlier dis-

cussion of the transaction, we note that the valuation placed on the Clients Contractual Accounts and the creation of the account were concurred in by Weiner, who participated in developing the accounting treatment.

---

[24] He made an error that Goldblum feared would invite close scrutiny of the financial statements, and was then replaced in this role by Lowell.

---

[25] Because covering up the receipt of "recip" was one of the reasons given for many questionable recording practices, the jury could logically infer that Block's statement showed knowledge of at least some of these practices.

---

[26] The instruction reads, in pertinent part:

> "One circumstance you are entitled to consider and weigh in determining whether the defendants Weiner, Lichtig, and Block acted willfully and knowingly

while in their capacities as independent accountants in relation to Equity Funding is whether they followed or deviated from generally accepted auditing standards or accounting principles in effect at the times here pertinent.

"For example, in this case, you may recall evidence of certain accounting principles or auditing standards which were talked about.

"The government points to evidence which they say establishes that, at various times each of the defendants deviated from sound accounting principles and auditing standards.

"Evidence on this issue is not conclusive, however, on the overriding issue of the defendant's [sic] knowledge and intent. The weight and credibility to be extended by you to such proof must depend among other things, on the weight you give to the opinion evidence offered by the Governments' [sic] witnesses.

"Generally, when a certified public accountant is engaged to perform an independent audit for a corporation such as Equity Funding, he represents and warrants that he will perform the audit and other accounting work in

accordance with generally accepted auditing standards and generally accepted accounting principles and that he will render an opinion as to whether the financial statement of the company fairly represents its financial position and the results of its business operation.

"Proof, if any, that any of these defendants departed from such standards of auditing and accounting as were then applicable or participated in the preparation or approval of an audited financial statement that did not fairly present Equity Funding's financial position is evidence, though not necessarily conclusive evidence, that the individual defendant involved did not act honestly or in good faith, and that the financial statement prepared contrary to such standards may have been materially false or misleading."

---

[27] "The objective of the ordinary examination of financial statements by the independent auditor is the expression of an opinion on the fairness with which they present financial position in conformity with generally accepted accounting principles. The auditor's report is the medium through which he expresses his opinion or, if circumstances require, dis-

claims an opinion. In either case, he states whether his examination has been made in accordance with generally accepted auditing standards." Committee on Auditing Procedure, American Institute of Certified Public Accountants, Statement on Auditing Standards § 110.01 (1973).

---

[28] The instruction reads, in pertinent part:

> "It is not enough, of course, merely to establish that a given defendant acted negligently or through error or mistake. Under our system of laws men are not punished criminally for mere mistakes in judgment, mismanagement, carelessness, negligence, or errors of judgment. They are punished only for intentional wrongdoing. The defendants are not on trial here for errors of judgment or mistakes or mismanagement or negligence, but are on trial for a criminal offense, and an essential element of that offense is an evil or criminal intent, which it is incumbent upon the government to prove to your satisfaction and beyond a reasonable doubt before you will be warranted in returning a verdict of guilty.
>
> "The defendants argue that

they acted in good faith in their activities relating to Equity Funding. Good faith, that is to say, an honest belief in the truth of the statement made, would constitute a complete defense here.

"If the evidence in the case leaves you with a reasonable doubt as to whether the accused in good faith believed the financial statements, auditors' certificates, and other written statements to be true at the time they were made, then you should acquit the accused.

"While I have stated that negligence or mistake does not constitute guilty knowledge or intent, nevertheless, ladies and gentlemen, you are entitled to consider in determining whether a defendant acted with such intent if he deliberately closed his eyes to the obvious or to the facts that certainly would be observed or ascertained in the course of his portion of the accounting works, or whether he recklessly states as facts matters of which he knew he was ignorant.

"If you find such a reckless, deliberate indifference to or disregard for truth or falsity on the part of a given defendant when considered in the light of all other evidence relating to intent,

you may, but you need not necessarily, infer therefrom that such defendant acted willfully and knowingly. Such an inference, of course, depends upon the weight and credibility extended to the evidence of reckless and indifferent conduct, if any."

---

[29] Block and Weiner also raise this issue in regard to Counts 80 and 84.

---

[30] Block's and Weiner's incorporation of this argument is clearly meritless since Lichtig's argument is premised on his change in position.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

F I L E D

JUL 21 1978

EMIL E. MELFI, JR.
CLERK, U.S. COURT
OF APPEALS

UNITED STATES OF AMERICA Appellee, v. JULIAN S. H. WEINER; MARVIN AL LICHTIG: and SOLOMON BLOCK, Appellants.	)	No. 75-2973 ORDER

Appeal from the United States District Court for the Central District of California

Before: CHOY and GOODWIN, Circuit Judges, and THOMPSON*, District Judge.

On May 26, 1978, appellants Weiner and Block filed a petition for rehearing with a suggestion for rehearing en banc.

On May 30, 1978, appellant Lichtig filed a petition for rehearing.

---

* The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

The panel as constituted in this case has voted to amend the opinion filed May 15, 1978, in the following particulars:

At page 10, line 5, of the typewritten opinion (page 1587 of the printed slip opinion, top of right-hand column), starting with "Lichtig's present claim", delete the remainder of the paragraph and substitute the following language:

> Lichtig claims he discovered the existence of the agreement on May 7, 1976, almost a year after the conclusion of the trial. However, the record on appeal does not contain any evidence of the agreement or of the government's knowledge that such an agreement existed. The issue is therefore not properly before us.

At page 35, line 20, of the typewritten opinion (page 1601 of the printed slip opinion, line 10, right-hand column), delete the period after the word "statement" and insert before "The untrue" the following language:

> which stated that an independent audit of the financial

statement using GAAS had found it to reflect truthfully the financial condition of the company and its operations and to have been prepared according to GAAP.

Count 76 charges that Lichtig and another defendant "wilfully made and caused to be made untrue statements of material fact" or "wilfully omitted and caused to be omitted statements of material fact" in the December registration statement.

At page 36, lines 15-18, of the typewritten opinion (page 1602 of the printed slip opinion, lines 12-16, left hand column), delete the two sentences beginning "The SEC had previously ruled" and ending "to receive such money."

At page 48, line 11, of the typewritten opinion (page 1608 of the printed slip opinion, line 4, right-hand column), substitute "Lichtig" for "Block".

With the opinion so amended, the panel has voted to deny the petitions

for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the proposed amendments, and of the suggestion for rehearing en banc, and no judge has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

It is ordered that the opinion in this case is amended as set forth above; the petition for rehearing filed by appellant Lichtig is denied; and the petition for rehearing filed by appellants Weiner and Block is denied and their suggestion for rehearing en banc is rejected.

AFFIDAVIT OF SERVICE IN COMPLIANCE
WITH SUPREME COURT RULE 33(3)(c)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1901 Avenue of the Stars, Suite 700, Los Angeles, California 90067.

On August 24, 1978, I served the within APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on the parties in this action pursuant to Supreme Court Rule 33(1) and (2)(a) by placing three true copies thereof in an envelope addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

U.S. Attorney's Office
312 North Spring Street
Los Angeles, California 900

Abeles and Markowitz
315 S. Beverly Drive
Beverly Hills, California 90212

and by then sealing said envelope and depositing same, with postage thereon fully prepaid, in the United States mail at 1901 Avenue of the Stars, Level "A", Los Angeles, California 90067.

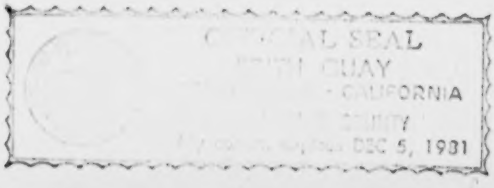
Brent W. Smith

BRENT W. SMITH

Subscribed and Sworn to before me this 24th day of August, 1978

Edith Quay

Notary Public in and for the State of California, County of Los Angeles



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-284

MARVIN A. LICHTIG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF ON BEHALF

OF

PETITIONER MARVIN A. LICHTIG

LAW OFFICES OF RICHARD A. DeSANTIS
RICHARD A. DeSANTIS

Attorneys for Petitioner
MARVIN A. LICHTIG

1901 Avenue of the Stars
Suite 700
Los Angeles, California 90067

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases

Articles

I THE GOVERNMENT SERIOUSLY MISSTATES THE FACTS

Page 4 of the Government's Opposition to the Petition seriously misrepresents the facts and gives the impression to this Court that the record establishes that Lichtig "concealed the improper manipulation of various accounts". Examination of the government's citations to the record reveals no such support and in no way establishes that Lichtig knowingly or intentionally concealed the improper manipulation of various accounts; nor could there be since such evidence was lacking at the trial. Indeed, this is gross misrepresentation since the government produced not one witness who testified that Lichtig was part of the fraud conspiracy.

Government citations, page 4:

A. 10 Tr. 1682-1752 is the testimony of Jerome Evans, a participant in the fraud. At page 1711-1712 Mr. Evans testified that Lichtig requested back up information to confirm figures and that Evans provided to him forged back up material. Evans' testimony is summed up as follows: "To the best of my knowledge, I am not aware that he [Lichtig] had any idea of anything that was wrong on the books and records of Equity Funding" (10 Tr. 1781), and at page 1801:
"Q: But there was no reason that you have now

or had then which would indicate to you that Marvin Lichtig ever definitely had any knowledge of the bogus entries; isn't that right sir? A: To my knowledge, he had no knowledge of these entries." At no time does Mr. Evans' testimony support the thesis Lichtig knowingly prepared any false statements or concealed any improper manipulation.

B. 11 Tr. 1816-1866, 1911-1961 is the testimony of Templeton, controller under Evans. He did not testify that Lichtig concealed improper manipulation of various accounts. Templeton testifies about problems raised by Evans leaving EFCA without adequate record and that Lichtig wanted to be thorough in reconstructing the books that SEC would not grant the amount of time to do so. He further testified at page 1847 that "recips" were not illegal.

C. 12 Tr. 2282 does not exist.

D. 21 Tr. 155-156, and 175 is the testimony of Frank West pertaining to audits rendered in 1970 and subsequently and is totally irrelevant to Lichtig.

E. 26 Tr. 19-21, is the testimony of Al Finci of Seidman & Seidman. He testified about the merger between WWR & L and Seidman & Seidman in 1971 and 1972, years after Lichtig ceased auditing; such testimony was totally irrelevant to Lichtig.

F. 27 Tr. 1594-1636. There are no such pages in Volume 27.

G. 34 Tr. 1157-1166, is the testimony of "summary witness" William Simpson a SEC staff accountant, who was a non CPA, not participant to any of the facts.He purported to relate what was found in some of the purported work papers, but whose testimony was objected to on several grounds including competency.

H. 35 Tr. 1412-1418. This testimony had no probative application because over 70% of the auditors' work papers were never produced by the government nor admitted into evidence.

I. 41 Tr. 2327-2328 consists of testimony of Joe DeArmas, a Seidman & Seidman partner who testified only about audits commencing in 1971, long after Lichtig ceased acting as any auditor.

J. Page 41 Tr. 2358, 2380-82, is the testimony of Mr. Chernock, a WWR & L auditor who testified that only about 20 to 30 percent of the audit work papers prepared on EFCA by WWR & L as to all prior years were in the courtroom or admitted into evidence.

K. 44 Tr. 2781-2830, 3032-3035, 46 Tr.3143-3147 consists of the testimony of Defendant Weiner which establishes only that Lichtig was an auditor on the EFCA account until approximately March or April of 1969 and he left the auditing firm in that year to become an employee of EFCA.

These misstatements of fact are more egregious because (1) there was no evidence that

Lichtig signed or certified any financial statements as an auditor (1969 and prior); (2) the government failed to call one single accountant of the many who worked on the audits prior to 1969 and failed to note that each of the fraud conspirators who testified directly denied that Lichtig had any knowledge of the fraud.

Evans 10 Tr. 1711-12, 1784, 1801; Levin 21 Tr. 133-5; Sultan 17 Tr. 34-5, 45-6; Lowell 32 Tr. 755; 33 Tr 963.

At footnote 4 of its Brief, the Government makes a serious charge against Lichtig which has no support in the record. The Government claims in the footnote that:

> "While Lichtig was associated with Wolfson Weiner, the purportedly independent auditor of EFCA, he held hidden stock interests in EFCA, worth over $100,000.00.

Examination of the record cited in that footnote (7 Tr. 1152-1166; 10 Tr. 1754-1769; 25 Tr. 914, 922-930) reveals that this extremely prejudicial assertion by the Government is without foundation. Hidden from whom? There is no testimony indicating that Lichtig hid anything from anyone about stock ownership. There is no testimony establishing that he ever held stock "worth over $100,000.00". The testimony cited by the Government does establish that Esther Borkin sold

EFCA stock that she held in 1967 for approximately $17,000.00. However, there was no evidence before the Court establishing that such stock transactions were in any way illegal. Any stock that Lichtig held while he was an officer of EFCA is clearly irrelevant to his culpability as an auditor up to April 1969. As for the $100,000.00 figure, what evidence is there before the Court as to any such amount? None of the Government's citations in footnote 4 establish it.

To make matters even worse, at page 4 of its brief, the Government asserts that "at a meeting with petitioner Weiner and others involved in the fraud, Lichtig disclosed that an asset had been inflated by 10 million dollars in a single year and discussed how that would be concealed on financial statements". The citations presented by the Government, discussed below, do not support this assertion.

A. 17 Tr. 145-147 is the testimony of Lloyd Edens, one of the conspirators of the EFCA fraud. He did not testify to any meeting whereat "Lichtig disclosed that an asset had been inflated by 10 million dollars in a single year and discussed how it would be concealed on the financial statements". The matters testified to by Edens at those pages pertained to discussions he had with Lowell and Mercado in January of 1970 and they did not involve Lichtig.

B. 19 Tr. 48-51, is the testimony of Fred Levin, who testified that Lichtig did not know about the fraud. (21 Tr. 133-135). The testimony given on pages 48-51, in no way establishes that Lichtig concealed an inflated asset by 10 million dollars. Levin did testify as to those pages as to a mathamatical error made by Lichtig while he was an EFCA employee in 1969. As a result of this error in calculation, Lichtig was replaced by Sam Lowell, who then acted as EFCA's chief financial officer. The Government never argued at trial that Lichtig's conviction should be based upon this arithmatic miscalculation.

C. 27 Tr. 336-344, 28 Tr. 47-70; 33 Tr. 967-968 is the testimony of Samuel Lowell, one of the perpetrators of the EFCA fraud. Lowell was inconsistent in his testimony but gave a statement when he was suicidal that Lichtig did not know that EFCA's journal entries were fabrications. (32 Tr. 755, 33 Tr. 958-963, and Exhibit AX).

D. 34 Tr. 1176-1177, is Mr. Simpson evaluating the adequacy of Lichtig's workpapers --- an evaluation that is worthless in light of the fact that over 70% of the workpapers are not admitted into evidence and Simpson is not a percipient witness.

II THE POLICY OF SCIENTER IN SECURITY CASES

The Government did not even atempt to defend Instructions Nos. 35 and 36 (i.e. "recklessness") on the grounds asserted by the Court below at 578 F.2d 787. The Court claimed the instruction was approved in United States v. Natelli, 527 F.2d 311, 322-323 (2d Cir. 1975) cert. denied 425 U.S. 934 (1976) and supported by United States v. Simon, 425 F. 2d 796, 809 (2d Cir. 1969). Rather than even mentioning Simon or Natelli, or even responding to Lichtig's argument that the facts of those cases (i.e. actual knowledge by the auditor that the account receivable simply did not exist) did not apply below, the Government's response is to make the weak excuse that:

> "The Court carefully followed this passage [Instruction Nos. 35-36], however, with an instruction that an inference of guilty knowledge from such deliberately reckless conduct was merely a permissable influence to be considered after all the circumstances and was not an inference required to be drawn";

and also to give this Court the false impression that the record below fits the "actual knowledge" fact situation of Natelli when the truth is quite the opposite. Lichtig was convicted of "judgmental errors. The Government's weak excuse begs the question because the record below shows that it was in fact the inference the jury members

did draw. They had to draw this inference in order to find Lichtig guilty because the following facts ruled out any jury finding that Lichtig scienter was actual knowledge. He was found to be "reckless".

The perpetraters of the EFCA fraud testified at trial and Stanley Golblum himself later testified that Lichtig did not know about the EFCA fraud and specifically, that Lichtig did not know that the journal entries on EFCA's books were fabrications. 10 Tr. 1711-12, 1784, 1801 (Evans) 33 Tr. 963 and Exhibit AX (Lowell); 32 Tr. 755 (Lowell); 17 Tr. 24-34, 45-46, (Sultan); 21 Tr. 133-35 (Levin).

In Ernst & Ernst v. Hochfelder, 425 U.S.185 (1976) the plaintiffs claimed that the accountant in not discovering Nay's mail rule had violated Section 10(b) and Rule 10b-5 by negligently failing to use "appropriate auditing procedures". 425 U.S. at 190.

The Court traced the legislative history of the 1934 Act and stated that the "penal and civil sanctions" of the 1934 Act were "aimed at those manipulative and deceptive practices which have been demonstrated to fulfill no useful function" 425 U.S. at 204-5, and "there is no indication that any type of criminal or civil liability is to attach in the absence of scienter". 425 U.S. at 205.

This Court held that scienter is required in all actions for civil liability under Rule 10-b-5. 425 U.S. at 191-2 n.7.

This Court rejected the view of the SEC that negligence would be sufficient to constitute a violation, and accordingly we must presume that negligence is insufficient to constitute a criminal violation.

Therefore, if negligence cannot result in criminal violation, is recklessness different from negligence, and if so, how?

If "recklessness" is sufficient to impose criminal sanction, what conduct is embraced by such standard?

> "The definition of 'reckless behavior' should not be a liberal one lest any discerning distinction between "scienter" and "negligence" be obliterated for thse purposes." Sanders v. John Nuveen & Co., Inc., 554 F.2d 790, 793 (7th Cir. 1977).

The definition of "recklessness" has eluded the courts and is ripe for elucidation. The Trial Court below referred to "recklessly" as "negligence plus". 61 Tr. 5184.

In this case the Government presented not one accountant who had worked on audits prior to 1969, not one CPA accountant who had analyzed the work

papers of the audits prior to 1970, and failed to produce even forty percent of the audit work papers. Was the standard of the Trial Court "negligence plus" sufficient to apply criminal sanction in this securities case?

Is there any objective discernible difference between this case where the Government claimed that Lichtig should have discovered the fraud because according to them he had "failed to use appropriate audit procedures", and the Ernst & Ernst accountants? Since recklessness is "an extreme departure from the standards of ordinary care", Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir. 1976), how may an accountant tell when or if such "recklessness" wreaks upon him in securities matters, civil or criminal sanction if it does?

Should an auditor who was hospitalized (as Lichtig was in 1968) be criminally responsible for auditing failures on the theory of recklessness?

Although the Government does not deny that there was no evidence below as to the GAAP and GAAS operating at the time of Lichtig's audit, the Government improperly and incorrectly implies at page 9 of its brief, that "several witnesses testified" that Lichtig's practices as an auditor violated generally accepted auditing standards

and generally accepted auditing principles (GAAS) and (GAAP). The citations to the record given by the government, listed below, simply do not support its assertion.

Indeed, the government never refutes the point raised by Lichtig in his petition that the only GAAS and GAAP entered into evidence was that adopted in 1973, over four years after Lichtig terminated his functions as an auditor and after the exposure of the EFCA rocked the accounting profession. The government never introduced at the trial any evidence as to GAAS and GAAP operative at the time Lichtig supposedly committed his crime as an auditor in 1968/1969.

The ex post facto evaluation is improper, prejudicial and unconstitutional. Rather than point out each government misstatement again, Lichtig refers to the testimony of government witness Norman Grosman, a partner of Touche, Ross & Company, as to the GAAS and GAAP existing in 1973, cited by the government, at 38 Tr. 1841. Mr. Grosman read into the record the following 1973 standard:

> "If an objective of an independent auditor's examination were the discovery of all fraud, he would have to extend his work to a point where its cost would be prohibitive. Even then he could not give assurance that all types of fraud had been detected or that none existed, because items

such as unrecorded transactions, forgeries, and collusive fraud, would not necessarily be uncovered."

That is precisely the nature of the fraud tha EFCA management perpetrated upon the auditors, which included Lichtig, Pete Marwick & Mitchell, Seidman & Seidman, Coopers and Lybrand, Haskins a Sells, the IRS and the SEC itself. None of these other auditing firms were indicted by the government for any failure to "play detective" and uncover the EFCA fraud -- not even for the auditing services rendered in the last years of the fraud. And yet, Lichtig, who was one of the accountants for the 1968 audit (when the EFCA fraud was not nearly as widespread as it was later), is the one singled out for the "crime" of performing an insufficient audit. Grosman provided no evidence as to Lichtig's noncompliance with GAAP; if anything Grosman provided exculpating testimony.

Thus, once again the Government assertions against Lichtig are belied by the record -- even the transcript pages on which it imprudently rel

Petitioner's counsel is aware of Supreme Court Rule 23(4) which requires "brevity". However, because the Government's misrepresentation of the facts and reliance on inappropriate case law is so widespread, Petitioner finds it necess to discuss these matters at length.

III THE GOVERNMENT CANNOT REFUTE THAT GROUNDS EXIST UNDER SUPREME COURT RULE 19(1)(b) FOR A REVIEW OF CERTIORARI CONCERNING THE ALLEN INSTRUCTION GIVEN BELOW

In footnote 8 of its Opposition Brief, the Government acknowledges the conflict among the various circuits concerning the Allen Instruction. The Government claims that this conflict should be of no concern to this Court and that certiorari was denied "in several other cases presenting a similar issue."

The Government is wrong on both counts; the Government has failed to cite in footnote 8 or anywhere else in its Brief, any case wherein a court has approved an Allen Instruction containing the language used by the trial court below; or any case refuting the cases cited by Lichtig at pages 6,9, and 10 of the Petition. Indeed, the Government has failed to refute those cases cited by Petitioner Lichtig wherein the precise language used in the Allen Instruction below was deemed to be improper, coercive, and mandating reversal.

The language contained in the Allen Instruction given below goes beyond that ever approved of in any reported decision (and certainly beyond that approved in the decisions cited by the Government) and contains language that has been

expressly disapproved by this Court (Jenkins v. United States, 380 U.S. 445 (1965); the California Supreme Court (People v. Gainer, 19 Cal.3d 835, 139 Cal.Rptr.861 (1977)); and three Federal Circuits and 22 states (each of which are noted in footnotes 7 and 8 of People v. Gainer). Pursuant to these authorities, which the Government cannot refute, the grounds for granting this petition have been established under Rule 19.

The policy grounds for a review of the Allen Instruction under Supreme Court Rule 19 are emphasized in People v. Gainer, supra, the recent decision by the California Supreme Court invalidating an Allen Instruction extremely similar to that given below. The opinion, by Justice Mosk (with only Justices Clark and Richardson dissenting) adopted a per se policy rule disapproving the following language:

> "You should consider that the case must at some time be decided." [citations omitted]. (19 Cal.3d at 870).
>
> "...that the jury had been 'selected in the same manner and from the same source from which any future jury must be selected, and there is no reason to suppose the case will ever be submitted to twelve men or women more intelligent, more impartial or more competent to decide it...' " [citations omitted]. (Id. at 844-845).

"If much the larger number were for conviction, the dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent, with himself....". Id at 843.

"A reference to the expense and inconvenience of a retrial." Id. at 852.

The California Supreme Court has held that such language improperly asks the jurors to consider factors irrelevant to the defendant's guilt or innocense. Furthermore, an instruction that the case must be decided at some time is:

". . . legally inaccurate. It is simply not true that a criminal case 'must at some time be decided'. The possibility of a hung jury is an inevitable by-product of our unanimous verdict requirement". 19 Cal.3d 851-853, 139 Cal.Rptr. 870-871.

Also, the California Supreme Court noted another sound policy ground for banning the Allen Instruction on a per se basis: "appellate economy" which would be served by "removing a fertile source of criminal appeals". 19 Cal.3d at 853, 139 Cal.Rptr. at 870-71 (footnote 17).

These policy grounds support granting a writ of certiorari under Supreme Court Rule 19.

IV THE GOVERNMENT'S ALLEN ARGUMENT DOES NOT ADDRESS THE ISSUE AND RELIES UPON CASES WHICH SUPPORT PETITIONER LICHTIG

The Government argues at page 11 of its brief that United States v. Dyba, 554 F.2d 417, 420-421 (10th Cir. 1977) cert. denied, 434 U.S. 830 1977 United States v. Cheramie, 520 F.2d 325, 328-332 (5th Cir. 1975) and Munroe v. United States 424 F.2d 243, 245-247 (10th Cir. 1970) establish that an Allen Instruction such as that given below contains "ample protection against the danger that it [the jury] would perceive the court's charge as requiring a guilty verdict".

The first point is that the Government's argument totally misstates the issue. The issue is not whether the jury perceived the Court's charge as requiring a guilty verdict, the issue is whether the jury perceived the Court's charge as requiring any verdict. (That such a jury perception is grounds for a reversal is fully explained in People v. Gainer, 19 Cal.3d 835, 851-853, 139 Cal.Rptr. 861, 869-871 (1977); "reversible error may be found in excessive pressure upon the jury to reach a verdict, whatever its nature, rather than no verdict at all".)

The second point is that although the Government tries to give this Court the impression that

the cases cited at page 11 of its Brief contain similar Allen Instruction language, the truth is that they do not contain such language and that the safeguards urged in those cases did not exist in the case below -- a reversible error.

The Court in United States v. Dyba, supra, (where defendant's counsel failed to object to the Allen Instruction) found that the Instruction of that case was not prejudical in light of facts not applicable here. The instruction in Dyba (reproduced in a footnote appearing at 554 F.2d 420-421) reveals that it was free from following improper language.

> "If you should fail to agree on a verdict, the case is left open and undecided. Like all cases it must be disposed of sometime.....they are matters which along with others and perhaps more obvious ones, remind us of how desirable it is that you unanimously agree on a verdict." 61 Tr.5272.

Similarly, in Munroe v. United States, supra, the instruction given to the jury (as reproduced in footnote 4 of that opinion) lacked the above-quoted improper language used in the trial below.

The Munroe Court stressed at 424 F.2d 246 that the Allen Instruction in that case was permissable because it was not given to a deadlocked jury. There is no dispute that the jury below was deadlocked after four and one-half days of

deliberation. In fact, the Munroe Court noted at 424 F.2d 246 that when such Allen Instructions are given to a deadlocked jury inherent reversible error arises. In fact, the Munroe Court concluded its opinion by admonishing trial judges to heed the warnings it stated in United States v. Wynn, 415 F.2d 135 (10th Cir. 1969) and United States v. Winn, 411 F.2d 415 (10th Cir.1969) against giving the Allen Instruction to deadlocked juries.

The Government's remaining cited case, United States v. Cheramie, supra, helps petitioner Lichtig most of all. The Cheramie Court at 520 F.2d 330-331 listed the factors establishing that the Allen Instruction given in Cheramie was not improper. None of these factors help the Government's position.

Furthermore, the Cheramie Court restated a principal in United States v. Amaya, 509 F.2d 8 (5th Cir. 1975) voiding variations of the Allen change, such as those that occurred at the trial below.

> "Where a charge may be plausibly read as more coercive than the standard charge, we must hold that the charge was incorrectly given... In the first part, we are unwilling to risk even a small chance of increased -- and therefore immediately illegitimate -- jury coercion over that which inheres in the borderline Allen charge merely for the

sake of instructional novelty. In the second part, to hold otherwise would turn this Court into a psychologists' symposium with resultant great expenditures of energy, yet necessarily capricious solutions."
520 F.2d at 330.

This is precisely the situation existing in the instant case.

People v. Gainer, supra, suggests that despite the fact it may be:

> "...possible to demonstrate that the Allen's admonition to dissenters were without appreciable effect on a jury, it would nevertheless be objectionable as a judicial attempt to inject illegitimate considerations into the jury debates and as an appeal to the dissenting jurors to abandon their own independent judgment of the case against the accused."
> 19 Cal.3d at 849, 137 Cal.Rptr. at 868.

It must be deemed reversible error.

The California Supreme Court noted in footnote 11 of People v. Gainer that when objections are raised to the admissibility of juror testimony, such as the precise objections raised by the Government herein, it further establishes the grounds for holding the Allen Instruction per se improper. If a per se rule of reversible error is not followed, then absurdities arise such as the one caused by the Government's position in this case. On one hand, the Government at pages

11 and 12 of its brief freely speculates as to how the jury responded to the Allen Instruction. And yet on the other hand, it steadfastly objects to the admission into evidence of the affidavits of the jurors which establishes the truth as to the jury's reaction -- they were coerced into reaching a verdict because they thought they had to.

The California Supreme Court stated in People v. Gainer, supra, a sound per se rule invalidating the Allen Instruction, based on policy considerations that this Court should adopt for all the federal Circuits.

> "Courts are generally unable to recreate effectively the events, subjective and objective, occurring during jurors' deliberations in order to evaluate the actual effects of an instruction. Nor is it clear that even if judges were given such retrospective omniscience, they could agree on the point at which a juror was 'coerced' into changing his vote. [The analysis should be as to the]. . .potential effect of a given instruction on the fact finding process rather than as an attempted inquiry to the actual volitional quality of a particular jury verdict. Defendant's claim that the Allen charge is inherently coercive is thus more aptly phrased as a contention that the instruction simply exerts 'undue pressure upon the jury to reach a verdict.' United States v. Seawell, (9th Cir.1977) 550 F.2d 1159, 1163." 19 Cal.3d at 849-850, 139 Cal. Rptr. at 868-869.

It is little wonder that the Cheramie Court noted that "the Allen charge both deserves and receives a healthy disrespect in our courts." 520 F.2d at 330.

This Court should grant Lichtig's petition and expunge this problem.

V. SUMMARY

Major troublesome legal issues are presented by Lichtig's Petition. For many years the dubious use of the Allen charge and various versions thereof have been made the subject of debate. This Court should speak in respect thereof in an effort to reconcile the Circuits opinions.

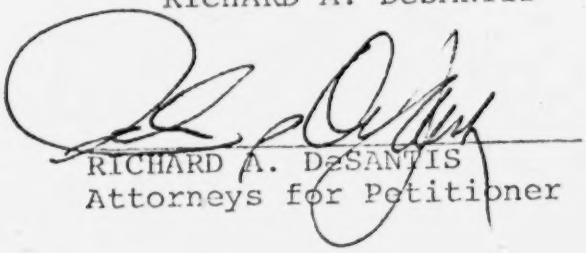
Accountants and other professionals have recently come under fire for acts which, on a theoretical level are deemed negligent or reckless. At a time when the entire profession has rejected the notion that it can ferret out management fraud, regulators attempt to place upon them the onerous role of policeman, a role for which accountants were not intended or equipped. See Can Accountants Uncover Management Fraud? Bus. Week, July 10, 1978. By what standards should such accountants be judged for criminal sanction? At issue here is whether accountants who "recklessly" fail to uncover management fraud must be held criminally responsible.

For these reasons the Petition should be granted.

DATED: November 17, 1978

Respectfully submitted,

LAW OFFICES OF
RICHARD A. DeSANTIS



RICHARD A. DeSANTIS
Attorneys for Petitioner

AFFIDAVIT OF SERVICE IN COMPLIANCE WITH SUPREME COURT RULE 33(3)(c)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1901 Avenue of the Stars, Suite 700, Los Angeles, California 90067.

On November 18, 1978, I served the within REPLY BRIEF RE PETITION FOR A WRIT OF CERTIORARI on the parties in this action pursuant to Supreme Court Rule 33(1) and (2)(a) by placing true copies thereof in an envelope addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

U.S. Attorneys Office
312 North Spring Street
Los Angeles, Calif. 90012

and by then sealing said envelope and depositing same, with postage thereon fully prepaid, in the United States mail at 1901 Avenue of the Stars, Leval "A", Los Angeles, California 90067.

Paul R Salemo

Subscribed and sworn to before me this 18 day of November, 1978.

Delphine S Meade
Notary Public in and for the State of California, County of Los Angeles